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PLEDGE AND LIEN IN SCOTS LAW

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DOCTOR OF PHILOSOPHY

UNIVERSITY OF EDINBURGH

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ABSTRACT OF THESIS (Regulation 3.5.10)

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The purpose of this thesis is to consider the Scots law relating to two of the principal types of security over moveable property. The first to be studied is pledge, the basic form of real security in most legal systems. A historical account of the subject is given, with a particular focus on Roman and Anglo-Norman law. This is followed by a comprehensive discussion of the modern rules of pledge, including the secured obligation, the constitution of the security and its enforcement. Comparative material is used to draw conclusions on the state of development of the law.

In the second place, the law of lien is examined. Once again the historical development of the security is traced in detail. Here the story is a longer one, because the law only became settled into its modern form after the writings of George Joseph Bell in the early nineteenth century. The substantive body of law on lien is given a detailed analysis. Particular focus is placed on the type of obligation a lien may secure, the type of property which may form the security subjects and the type of holding which is required on the part of the creditor. Both special lien and general lien are examined. Again, reference is made to comparative material.

The final section of the thesis explores the conceptual differences between pledge and lien, a matter which has been the subject of little previous examination in Scotland.

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I wish to thank my principal supervisor, Professor Kenneth G C Reid, and my second supervisor, Professor George L Gretton, for all their help and inspiration. In particular I would wish to record my appreciation for the amount of time they were willing to give me so freely during their busy professional lives. I also wish to thank Professor Duard G Kleyn, Professor Hector L MacQueen, Mr Niall R Whitty, Scott Wortley and the helpful librarians at the University of Edinburgh Law Library.

The fact that I have been able to complete this thesis in three years has been due to the support of a number of other people. I thank my Property Law tutorial students in the period 1994-1997 for the many happy hours I have spent teaching. I also record my thanks to all my friends. Finally, I would wish to thank my family. This thesis is dedicated to my grandparents, Jack and Thea Little and Harold and Catherine Steven.

DECLARATION

I certify that this thesis is entirely my own work.

ABBREVIATIONS

<i>Bankton</i>	Lord Bankton, <i>Institute of the Law of Scotland</i> , (1751-1753, Stair Soc vols 41-43)
<i>Begg</i>	J H Begg, <i>Law Agents</i> , (1873)
<i>Bell, Commentaries</i>	G J Bell, <i>Commentaries on the Law of Scotland</i> , (7th ed, ed Lord McLaren, 1870)
<i>Bell, Principles</i>	G J Bell, <i>Principles of the Law of Scotland</i> , (10th ed, ed Sheriff Guthrie, 1899)
<i>A P Bell</i>	A P Bell, <i>The Modern Law of Personal Property in England and Ireland</i> , (1989)
<i>Buckland</i>	W W Buckland, <i>A Textbook of Roman Law</i> , (3rd ed, by P Stein, 1966)
<i>Encyclopaedia</i>	<i>Encyclopaedia of the Laws of Scotland</i> , (3rd ed)
<i>Erskine</i>	Sir J Erskine, <i>Institute of the Law of Scotland</i> , (8th ed, ed Nicholson, 1870)
<i>Gloag and Irvine</i>	W M Gloag and J M Irvine, <i>Law of Rights in Security</i> , (1897)
<i>Halsbury</i>	Halsbury, <i>Laws of England</i> , (4th ed)
<i>Hume, Lectures</i>	David Hume, <i>Lectures</i> , vols I-VI (Stair Soc vols 5 (1939), 13 (1949), 15 (1952), 17 (1955), 18 (1957) and 19 (1958), ed G C H Paton)
<i>LAWSA</i>	<i>Law of South Africa</i>
<i>Shaw</i>	W Shaw, <i>Security over Moveables</i> , (1903)
<i>SME</i>	<i>The Laws of Scotland : Stair Memorial Encyclopaedia</i>
<i>Stair</i>	Viscount Stair, <i>Institutions of the Laws of Scotland</i> , (2nd ed, 1693, republished 1981, ed D M Walker)
<i>Thomas</i>	J A C Thomas, <i>Textbook of Roman Law</i> , (1976)

PART 1 : INTRODUCTION

1. Security over moveable property. Scots law, like most or all other jurisdictions makes a distinction between immoveable and moveable property.¹ Whilst property law is to a large extent a unitary subject, the clear difference between these two types of property necessitates a variance in the rules in particular areas. The law concerning real security is a clear example.

As to immoveable property - alternatively heritage or land - the law is relatively straightforward. Since the passing of the Conveyancing and Feudal Reform (Scotland) Act 1970, effectively only one form of heritable security is recognised : the standard security.² Three previous forms of security over land were abolished by the Act, simplifying the law.³

In the field of moveable security the picture could hardly be more different. As regards corporeal moveables, there exist a significant number of different types of security, for example, pledge, lien, hypothec, bonds of bottomry and respondentia and aircraft mortgage. As regards incorporeal moveables, there is the assignation in security. Further, a company may grant a floating charge over any part of its property and undertaking. This may include any part of its moveable property.⁴ Finally, the Department of Trade and Industry in 1994 published a consultation paper proposing the extension of the floating charge and the creation of a new fixed moveable security.⁵

The law of security over moveables can be seen to be a very complicated area. Moreover it, like the law of real security in general, is an area which has been the subject of little detailed research since Gloag and Irvine's magisterial *Law of Rights in Security* was published in 1897.⁶ In the words of Zimmermann and Dieckmann : "The largest hole in modern Scottish literature gapes in the area of security".⁷ This thesis marks the beginning of work in the whole area of moveable security. Due, however, to the constraints of space it will be only possible here to consider two types of moveable security, namely pledge and lien.

1. See K G C Reid, *SME*, vol 18, para 1; D L Carey Miller, *Corporeal Moveables in Scots Law*, (1991), paras 1.01-1.03; *A P Bell*, pp 19-21.

2. Conveyancing and Feudal Reform (Scotland) Act 1970 (c 35), s 9(3).

3. Namely the bond and disposition in security, the bond of cash credit and disposition in security and the *ex facie* absolute disposition. See D J Cusine, *Standard Securities*, (1991), chapter 3.

4. Companies Act 1985 (c 6), s 462(1).

5. Department of Trade and Industry Consultation Paper, *Security over Moveable Property in Scotland*, November 1994. Discussed by J Murray at 1995 SLT (News) 31, H Patrick at 1995 SLT (News) 42 and the present writer at 1995 SLT (News) 120.

6. See, however, A J Sim, *SME*, vol 20, paras 1-107 and D L Carey Miller, *Corporeal Moveables in Scots Law*, (1991), chapter 11.

7. R Zimmermann and J A Dieckmann, "The Literature of Scots Private Law" (1997) *Stell LR* 3, at 10.

2. The law of property and the law of obligations. The law of real security is found at the intersection of property law and the law of obligations,¹ a fact which makes the subject intrinsically interesting. On the one hand, property law governs matters such as the creation, transfer and extinction of the real right in security. On the other, the law of obligations governs the obligation the performance of which the real right secures.

It is very important when approaching the law of real security that its binary background is fully appreciated. In particular, over the last century and a half when property law in Scotland has been in a state of malaise, the emphasis has sometimes been placed too heavily on the obligational side of the subject.² This thesis will attempt to focus equally on the property law aspects of pledge and lien.

1. See generally, G L Gretton, "The Concept of Security", in D J Cusine (ed), *A Scots Conveyancing Miscellany*, (1987), p 126.

2. See, for example, the discussion below of pledge by a pledgee, at paras 75-82.

3. Historical and comparative matters. As with most areas of law, the modern law of pledge and lien is the product of its historical development. A key aim of this thesis is to trace the development of these types of security from the very beginning. This means examining the relevant Roman law, Anglo-Norman law, institutional writings and case law. It need hardly be stated that Scots law is a mixed system, the mixture to a large extent being a Roman and English one.¹ In this thesis, an attempt

will be made to show which parts of the law of pledge and lien are principally based on Roman law and which are principally based on English law.

A feature of the law of real security in general is the great variations between different legal systems.² One of the aims of this piece of work will be to make some comparisons between Scots law and the law of other jurisdictions. Particular attention will be paid to English law, which has been of clear influence over the years. A considerable number of references will be made to the law of South Africa because it is another mixed system and also because, like Scots law, it is uncodified. The rules of other jurisdictions, such as France, Germany, Quebec and Spain will also be considered where appropriate.

1. See, for example, O F Robinson, T D Fergus and W M Gordon, *European Legal History*, (2nd ed, 1994), para 8.1.1. Of course, Scots law had other influences such as feudal law and Canon law.

2. See, for example, J G Sauveplanne (ed), *Security over Corporeal Movables*, (1974) and M G Dickson, W Rosener and P M Storm, (eds), *Security on Movable Property and Receivables in Europe*, (1988).

4. The approach taken. The remainder of the thesis is made up of three sections. The first deals with pledge, the main type of conventional moveable security under Scots law.¹ The second deals with lien, a form of security which mostly arises by implication rather than being created expressly.² The third section is considerably shorter than the previous two and compares pledge and lien.³ Throughout the thesis the aim is to give a detailed exposition of the relevant law and to assess its state of development.

1. See below, paras 5-115.

2. See below, paras 116-273.

3. See below, paras 274-281.

PART 2 : PLEDGE

1. INTRODUCTION

5. Definition. A pledge¹ is a real right in security over moveable property, created by the transfer of possession of the property from its owner to another, in terms of an agreement between them which seeks to use the property to secure the performance of an obligation owed by the owner to the other.² The party who is granting the right in security over his property is known as the *pledger* or *pledgor*.³ The party receiving the security is known as the *pledgee*.⁴

1. In other languages : *pignus*, (Latin); *gage*, (French); *Faustpfandrecht*, (German); *håndpant*, (Danish); *pand*, (Dutch); *pegno*, (Italian); *penhor*, (Portuguese) and *prenda*, (Spanish). Source : M G Dickson, W Rosener and P M Storm (eds), *Security on Movable Property and Receivables in Europe*, (1988), p 219.

2. See *Stair*, I.13.11; *Bankton*, I.17.1; *Erskine*, III.1.33; Adam Smith, *Lectures on Jurisprudence*, (1978, ed R L Meek, D D Raphael and P G Stein) p 78; Bell, *Commentaries*, II,19; Bell, *Principles*, s 1363; Hume, *Lectures*, IV,2; *Gloag and Irvine*, pp 199-200; *Shaw*, p 10 and *Robertson & Baxter v Inglis* (1897) 24 R 758, at 777 per Lord McLaren.

3. *Débiteur*, (French); *Verpfänder*, (German); *håndpantsetter*, (Danish); *pandgever*, (Dutch); *datore di pegno*, (Italian); *devedor pignoratício*, (Portuguese) and *deudor pignoratício*, (Spanish). See *Dickson, Rosener and Storm*, p 221.

4. *Créancier gagiste*, (French); *Pfandgläubiger*, (German); *håndpantgever*, (Danish); *pandhouder*, (Dutch); *creditor pignoratizio*, (Italian); *credor pignoratício*, (Portuguese) and *acreddor pignoratício*, (Spanish). See *Dickson, Rosener and Storm*, pp 220-221.

6. Origins of the word. The word *pledge* in most languages is an assimilation of three basic notions.¹ These are the notions of a stake or a forfeit; a promise; and collateral security.

(a) *Pledge* as a stake or a forfeit. In the beginning, if the owner of property pledged it in security of an obligation which he later did not manage to perform then the property was simply forfeited.² Hence, the owner could be seen as gambling that he could duly perform. If he could not, then he lost his goods. It is rare to view *pledge* in this manner nowadays, as it seems universally to have become a term for collateral security.³

(b) *Pledge* as a "promise". A day does not usually pass without a newspaper using the word in this sense, for example "Devolution pledge on powers of councils".⁴ Thus, too, if a person "takes the pledge", then he vows to abstain from intoxicating liquor from then on. This meaning of the word coheres with the idea of the owner of the property promising to perform his obligation. It is really the intermediary between the idea of pledge as complete forfeiture and pledge as collateral security. Rather than placing the emphasis on forfeiture, it places it on the moral duty to perform.⁵

(c) *Pledge* as collateral security. This is a straightforward progression from the notion of "promise". For, if the emphasis is now on the moral duty to perform, then failure to do so should only see steps being taken against the property as a direct surrogate for performance. In other words the person to whom the obligation was owed should only be able to recover the level of his loss caused by non-performance and no more.⁶

1. See the important three part article, "The Pledge-Idea : A Study in Comparative Legal Ideas", by J H Wigmore, at (1897) 10 Harv LR 321; (1897) 10 Harv LR 389 and (1897) 11 Harv LR 18, particularly (1897) 10 Harv LR 321-325. The same ideas are found in the Hebrew expressions for pledge used in the Old Testament : see J Hastings, *Dictionary of the Bible*, (1900) s v "Pledge". Likewise, these notions lie behind the old Scots word for pledge, *wad* : see *An Etymological Dictionary of The Scottish Language*, vol 4, (1882) sv "wad" and *The Scottish National Dictionary*, vol x, (1976), sv "wad".

2. See Wigmore. For more on the Roman law, see R J Goebel, "Reconstructing the Roman Law of Real Security" (1961-62) 36 Tul LR 29, at pp 32-33 and for the old English law, see F Pollock and F W Maitland, *The History of English Law before Edward I*, (2nd ed, 1896, reprinted with new introduction by Milsom, 1968), p 186.

3. For an examination of pledge in a number of legal systems, see J G Sauveplanne (ed), *Security over Corporal Movables*, (1974). And Wigmore writes at (1897) 11 Harv LR 18, 38 : "there are evidences in nearly a dozen systems of law that the progress has been from a primitive forfeit-idea to a later collateral-security idea." But, Adam Smith describes pledge as a "wager" : *Lectures*, p 79. Further, the old Scots word for pledge, *wad* is also used to mean "bet" or "wager". Robert Burns in his *Earnest Cry*, (Ayr, 1786) writes "Faith ! I'll wad my new pleugh-pettle/ Ye'll see't or lang." One of the lines from Sir Walter Scott's *Heart of Midlothian*, (1818), is "I could risk a sma' wad". Even in the twentieth century in the unattributed work *Swatches o' Hamespun*, (Aberdeen, 1924) comes "I'll wad a croon it's Jamie Broon." For the full references to these and many other works using *wad* in this sense, see *The Scottish National Dictionary*, vol x, (1976) sv "wad".

4. *The Herald*, 19th May 1995, p 8.

5. See Wigmore, (1897) Harv LR 321, 323. It is suspected that the reason why S C Johnson & Son Inc have called their furniture polish "Pledge" and obtained a registered trade mark for the word is because they are promising that their polish will perform well. This, however, is conjecture.

6. See Wigmore, (1897) Harv LR 321, 325 and H F Jolowicz and B Nicholas, *Historical Introduction to the Study of Roman Law*, (3rd ed, 1972) at p 302.

7. Variations on the theme of collateral security. Within its meaning as a form of security, "pledge" can be viewed in at least five different ways.

(1) *Pledge* has often been used as a general term for security.¹ Stair, to an extent, adopts this treatment.² Voet makes express reference to it.³ The reason probably lies in Roman law, where the equivalent term, *pignus*, could be used as a generic term for security.⁴ This scheme is indeed adopted by Baron Hume and Professor Reid in their respective studies of the real rights recognised by the law of Scotland.⁵ However, while this approach may be perfectly justified by reference to Roman law it is perhaps best avoided now as it is capable of engendering confusion. In particular, the courts have persisted even this century in designating a security over the shares of a company as a "pledge of shares", when it is in fact an assignation in security.⁶ There are many other examples in legal literature of using "pledge" in an unduly wide fashion.⁷

(2) *Pledge* is a real right in security over the moveable property of another, as more fully defined above.⁸ This is the sense in which the word will be used here.

(3) *Pledge* is quite often used to mean the contract between pledger and pledgee.⁹ Whilst there is no need to criticise this use, it will be more convenient to refer to the "contract of pledge" when this sense is meant.

(4) *Pledge* is sometimes used to denote the piece of property which is subject to the security.¹⁰ However, to avoid confusion the expression "pledged property" will be adopted instead.

(5) Up till now *pledge* has been used as a noun. However, it is also a verb and use of the verb will often be made.¹¹

1. For example, by the Court of Session in *Ker of Greenhead v Scot and Elliot* (1695) Mor 9122.

2. *Stair*, I.13.11. In the sense that he treats hypothec under the subject of pledge. So too does Bankton : I.17. As does Adam Smith, *Lectures*, pp 78-81.
3. Voet, *Commentarius ad Pandectas*, (translated by Percival Gane, 1956) 20.1.1. Voet uses *pignus*.
4. See D.13.7.1 pr (Ulpian) and D 20.1.5.1 (Marcian) and para 18 below.
5. Hume, *Lectures*, IV,38 and K G C Reid, *SME*, vol 18, para 4.
6. For example, *Barron v National Bank* (1852) 14 D 565 and *Coats v Union Bank of Scotland* 1929 SC (HL) 114. The correct analysis is found in *Morrison v Harrison* (1876) 3 R 406 : see too W M Gloag, *Encyclopaedia*, vol 11, para 757.
7. For example, W A Wilson, "Security over Corporeal Movables in Scotland" in J G Sauveplanne (ed), *Security over Corporeal Movables*, (1974) p 43, at pp 45-46. D M Walker, *Principles of Scottish Private Law*, vol 3, (4th ed, 1989), pp 394-396 classes all manner of things under the heading "Pledge", for example attempts to circumvent s 62(4) of the Sale of Goods Act 1979 (c 54).
8. See above, para 5.
9. For example, Bell, *Principles* s 203; A J Sim, *SME*, vol 20, para 14 and E A Marshall, *Scots Mercantile Law*, (2nd ed, 1993) at para 7-78.
10. For example, Adam Smith, *Lectures*, p 78 writes under the heading "Pledges" : "That is, a subject which is given or pledged to an other for the security of a debt due to him." Another example is found in *Gloag and Irvine*, p 219, where the debtor is referred to as the "owner of the pledge".
11. The verb is equally applicable to using *pledge* in the sense of a promise.

8. Etymology. *Pledge* comes from the old French law term *plege* which meant "personal security" or "surety".¹ This at first seems surprising as pledge is a real security.² However, as will be seen, the distinction between personal and real security in medieval times was somewhat blurred.³ The French term for real security has left its mark on our legal system too. *Gage* shares the same Germanic root as *wad*, which was the term for pledge in Scotland in the Middle Ages.⁴ *Wadset*, the principal form of real security over land at that time, also shares the root.⁵ Another member of the family is the word *wager*.⁶ This supports the earlier analysis that one of the connotations of *pledge* is that of a stake. Also stemming from the same root are the terms *engagement* and *wedding*.⁷ These reflect the "promise" notion.

In English law there is evidence of the same French roots. *Pledge* is a term of art in England.⁸ The more formal term is *vadium*.⁹ This has been stated to come from the same Germanic root as *wad* and *wadset*.¹⁰ There is also probably a link with the Latin *vadimonium* which meant *bail* in Roman law.¹¹ This suggestion is supported

by the fact that pledge is a type of bailment in English law.¹² The English term for security over immoveables is *mortgage*, which clearly comes from *gage*.¹³

The Roman law term for *pledge*, *pignus*, sometimes finds itself in use in Scots law.¹⁴ From it, we get the noun *impignoration* and the verb *impignorate*. These words have been used as synonyms for pledge in its narrow and wide sense, although principally in older authority.¹⁵

1. The modern French term is *pleige*. *Plege* itself comes from the early Frankish Latin, *plevium* which derives from the medieval Latin, *plivium*. *Plivium* is a derivation of the medieval Latin verb *plevire*, meaning "to warrant, assure, undertake for, engage". This probably has Germanic origins. For a full discussion of the etymology, see *The Oxford English Dictionary*, (2nd ed), vol xi, (1989) s v "pledge". See also V S Meiners, "Formal Requirements of Pledge under Louisiana Civil Code Article 3158 and Related Articles" (1987) 48 La LR 129, note 6.

2. That is, security over a thing (*res*).

3. See below, para 36.

4. For *wad* as *pledge* see Balfour, *Practicks* pp 194-196. *Erskine*, II.8.3, writes : "*Wad*, in the old Saxon language, signified a pledge". For the etymology see *An Etymological Dictionary of The Scottish Language*, vol 4, (1882), sv "*wad*" and *The Scottish National Dictionary* (vol x, 1976), sv "*wad*". See also F Pollock and F W Maitland, *History of English Law*, (2nd ed), vol 2, p 117 and J H Wigmore, "The Pledge Idea : A Study in Comparative Legal Ideas" (1897) 10 Harv LR 321, 322-323.

5. *Ibid* and Walter Ross, *Lectures on the History and Practice of the Law of Scotland relative to Conveyancing and Legal Diligence*, (2nd ed, 1822), II,330.

6. *Pollock and Maitland, op cit*, n 4.

7. *Ibid* and T F T Plucknett, *A Concise History of the Common Law*, (5th ed, 1956), pp 628-629.

8. See *A P Bell*, chapter 6 and N E Palmer, *Bailment* (2nd ed, 1991) chapter 22.

9. *Pollock and Maitland, op cit*, n 4 and N E Palmer, *ibid*.

10. See *Pollock and Maitland*, and *Wigmore, op cit* n 4. In fact it seems that the Latin *vadium* derives from *wad* and not the other way around. *Wad* originally meant *cloth* in Gothic. With the Goths, cloth was anciently given and received instead of money and if a pledge was made, it would be done by leaving a piece of cloth. A pledge thus became known as a *wad*. See *An Etymological Dictionary of The Scottish Language, op cit* n 4.

11. For *vadimonium* as *bail*, see Gaius, *Institutes* 4,184.

12. See *Palmer, op cit*, n 8; G W Paton, *Bailment in the Common Law*, (1952), chapter 18 and *Coggs v Bernard* (1703) 2 Lord Raym 909, 919; 92 ER 107, 109 per Holt CJ. *Vadimonium* itself

probably originates in *wad* : see *An Etymological Dictionary of The Scottish Language*, *op cit* n 4.

13. See A W B Simpson, *A History of the Land Law*, (2nd ed, 1986), pp 141-143 and pp 242-247 and *Pollock and Maitland*, vol 2, pp 117-124.

14. For example, *Stair*, I.13.11. On the Roman law, see below paras 12-19.

15. For example, *Ramsay v Wilson* (1665) Mor 9113 and *Pringle v Gribton* (1710) Mor 9123.

9. Pawn. The word *pawn* has come to be used as a synonym for *pledge*, both north and south of the border and beyond.¹ Its origins are unclear, but a connection with the Latin *ponere*, to put down, seems likely.² The word shares the same root as the Dutch and German law terms for "pledge", these being *pand* and *Pfand* respectively.³ One exception to the general proposition that *pledge* and *pawn* are interchangeable is the bill of lading. These apparently can only be pledged.⁴ In Louisiana, *pledge* is used as a general term for real security and *pawn* means a pledge of moveable property.⁵

Since the eighteenth century, *pawn* has been more precisely used to refer to a pledge to a pawnbroker.⁶ This is a person offering credit whose activities are governed by statute, currently the Consumer Credit Act 1974. Pawnbrokers operate from pawnshops, the traditional sign of the premises being three gold balls, the symbol used in front of the houses of the medieval Lombard merchants.⁷ Any further reference to *pawn* will be to a pledge to a pawnbroker.

1. Indeed, according to *Bankton*, II.10.pr a pledge in respect of moveables is "generally called a pawn". For England, see N E Palmer, *Bailment*, (2nd ed, 1991), at p 1383. Shakespeare certainly used *pawn* to mean *pledge*, albeit it in a figurative context : "My Honor is at pawne, And but my going, nothing can redeem it" (2 Henry IV, II.iii.7 (1597)). Ben Jonson, *Every Man in his Humour*, (1598), IV.vii uses the word in a more mundane manner: "We haue no store of monie . . . but you shall haue good pawnes . . . this Iewell, and this gentlemans silke stockings". For other literary references and the full etymology of the word see *The Oxford English Dictionary*, vol xi, (2nd ed, 1989) sv "pawn".

2. See Wigmore, "The Pledge-Idea : A Study in Comparative Legal Ideas" (1897) 10 Harv LR 321, 322 note 3. *The Oxford English Dictionary*, *ibid* does not recognise any such derivation.

3. The root is the old French *pan*, which as well as meaning pledge meant piece of cloth. See *The OED*, *ibid*. Thus, the origins of *pawn* seem remarkably similar to those of *wad*. See above, para 8, n 10. On the Dutch law, see W M Kleijn, J P Jordaans, H B Krans, H D Ploeger and F A Steketee in J Chorus *et al*, *Introduction to Dutch Law*, (2nd ed, 1993) pp 84-87. In German law, the precise terminology is *Vertragspfandrecht* or *Faustpfandrecht*. See F Lent, *Sachenrecht : Ein*

Studienbuch, (14th ed, by K H Schwab, 1974), p 261 and F Baur, *Lehrbuch des Sachenrechts*, (13th ed, 1985), p 527.

4. This is certainly the English position : *Halsbury*, vol 36, para 101n.

5. See R Slovenko, "Of Pledge", (1958) 33 Tul LR 59.

6. That is, since the enactment of pawnbroking legislation. There were various pieces of legislation in the eighteenth century, the first consolidating statute being the Pawnbrokers Act of 1800 (39 & 40 Geo 3 c 99). See J K Macleod, "Pawnbroking : A Regulatory Issue", (1995) 24 JBL 155, 160. See also The American Law Institute, *Restatement of the Law of Security*, pp 8-9.

7. See *The Hutchinson Concise Encyclopaedia*, (1989), sv "pawnbroker".

2. HISTORY

(a) Early systems

10. Ancient law : Biblical evidence. As one commentator has put it, "pledge springs from natural law and is of the farthest antiquity", securing debts "in the primitive relations of men."¹ "Pledge" is mentioned no less than twenty four times in the Old Testament, the first time being in Genesis Chapter 38.² This can be dated approximately to 1700 BC and concerns the pledge of a seal, its cord, and a staff.³ The items were to secure the delivery of a young goat and it appears that they simply were to be forfeited if the kid was not delivered. Later, in Deuteronomy, God through Moses lays down rules to try to protect debtors. For example, millstones used for grinding corn are not to be taken in security, because they are a man's means of preparing food to keep his family alive.⁴

1. H Denis, quoted in V S Meiners, "Formal Requirements of Pledge Under Louisiana Civil Code 3158 and Related Articles" (1987) 48 La LR 129.

2. See R Young, *Analytical Concordance of the Bible*, (1879) sv "pledge".

3. Genesis 38:18.

4. Deuteronomy 24:6. Echoes of this can be found in the Debtors (Scotland) Act 1987, (c 18), s 16 (articles exempt from pawning). See also Deuteronomy 24:10-13.

11. Other early systems. The concept of pledge was also known in ancient Egypt.¹ There, a gruesome business developed whereby a debtor would deliver the mummy of his father to his creditor.² The latter was very happy to lend on this basis, for the pledged property was of significant religious value to the debtor and therefore he

would be sure to discharge the debt so he could get his mummy back. Further, according to Pufendorf, were the debtor indeed to fail to redeem the pledge, he would be held in the greatest disgrace and be denied burial after his own death.³ The ancient Greeks also widely used the pledge device, although probably in less macabre a fashion.⁴ A mix of Tartarian and Arabian jurisprudence, supplanted by Greek law, was the basis of the law in old Turkey. Ancient Turks in dispute about what this meant for a pledge transaction, would refer the matter to the Mufti at Constantinople.⁵ Pledge was also recognised in early India.⁶

1. V S Meiners, "Formal Requirements of Pledge Under Louisiana Civil Code Article 3158 and Related Articles" (1987) 48 La LR 129.

2. *Ibid.*

3. Pufendorf, *De Jure Naturae et Gentium*, V.10.13.

4. V S Meiners, *op cit* and J H Wigmore, "The Pledge-Idea : A Study in Comparative Legal Ideas III" (1897) 11 Harv LR 18-21.

5. Sir William Jones, *An Essay on the Law of Bailments*, (1781), pp 84-85. His source is a manuscript kept in the University of Cambridge Library.

6. J H Wigmore, "The Pledge-Idea : A Study in Comparative Legal Ideas II" (1897) 10 Harv LR 389, 416-417.

(b) Roman law

12. General. The most developed system of ancient law with respect to pledge and unsurprisingly the most influential on the Scots law of today is the law of ancient Rome.¹ A comprehensive account of the relevant civil law will not be given here for two reasons. Firstly, the subject has already been the subject of extensive research by eminent scholars.² Secondly, references to the specific rules of Roman law will be made later, when consideration is given to the parallel Scots law rules.³ However, it will be convenient at this stage to give an overview of the Roman law of security.

1. See below, para 42.

2. See M Kaser, *Das Römische Privatrecht*, (6th ed), translated by R Dannenbring as *Roman Private Law*, (2nd ed, 1968), pp 129-134; R Sohm, *Institutionen : Geschichte und System des Römischen Privatrechts*, (12th ed, 1905), translated by J C Ledlie as *Institutes of Roman Law*, (3rd ed, 1907), pp 351-357; B Nicholas, *An Introduction to Roman Law*, (1962) pp 149-153; Thomas, pp 329-334; Buckland, pp 470-478; H F Jolowicz and B Nicholas, *Historical*

Introduction to the Study of Roman Law, (3rd ed, 1972) pp 301-304; F Schulz, *Classical Roman Law*, (1951), pp 400-427; R J Goebel, "Reconstructing the Roman Law of Real Security" (1961-62) 36 Tul LR 29 and texts cited therein.

3. See below, for example, para 98.

13. Real and personal security. In ancient Rome, personal security was in fact far more common than real security.¹ This conjures up images of the debtor finding a third party to act as a cautioner, and indeed often this was what happened.² But equally, "personal security" meant that the debtor contracted with the creditor that if he defaulted upon the loan he would become the creditor's slave until he discharged the debt.³ Understandably, not all debtors would wish to take that risk and consequently would, if they were rich enough to have valuable assets, opt for real security.

1. B Nicholas, *An Introduction to Roman Law*, (1962), p 151. The distinction between the two types of security was very well established : see D.50.16.188.1.

2. Thomas, pp 334-339.

3. V S Meiners, "Formal Requirements of Pledge under Louisiana Civil Code Article 3158 and Related Articles" (1987) 48 La LR 129.

14. *Fiducia cum creditore*. This was the original form of real security in Roman law.¹ It involved the debtor transferring ownership of the *res* to the creditor by *mancipatio* or *in iure cessio*, subject to a covenant, *fiducia* or *pactum fiduciae*, that the creditor would reconvey upon the debtor fulfilling his obligation.² The *fiducia* would also contain conditions governing the circumstances in which the creditor could sell the thing, much like an "events of default" clause in a modern commercial loan. The essence of *fiducia cum creditore* was clearly the transfer of ownership. The debtor lost his real right. This meant that the creditor could alienate the property to a third party, even in breach of his *fiducia*, leaving the debtor with only his personal *actio fiduciae* against the creditor.³ There were other disadvantages to the debtor of this type of security too.⁴ Unless, there was a special arrangement by way of *precarium*, possession of the property was with the creditor, so the debtor could not utilise it. Further, successive securities over the asset were impossible.

1. Buckland, p 471; B Nicholas, *An Introduction to Roman Law*, (1962), p 151.

2. *Nicholas, ibid*; R J Goebel, "Reconstructing the Roman Law of Real Security" (1961-62) 36 Tul LR 29, 33-34.

3. *Ibid*; *Thomas*, p 329.

4. *Nicholas, op cit*, n 1.

15. *Pignus*. The unsatisfactory nature of *fiducia* led to the development of *pignus*, which was in widespread use before the time of the Empire.¹ This involved the debtor transferring merely the possession of the *res* to the creditor.² The debtor retained *dominium*.³ He was therefore protected from the creditor making a wrongful sale, although remaining unable to make use of his property. On the other hand, for a long time, the creditor was only protected by the possessory interdicts and was not regarded as having a real right.⁴

1. *Buckland*, p 472.

2. *Ibid*; *Nicholas*, p 151.

3. *Ibid*; R Zimmermann, *The Law of Obligations*, (1990), p 220.

4. *Buckland, ibid*; *Thomas*, p 330.

16. *Hypotheca*. The drawbacks of *pignus* were particularly felt in agricultural areas, where any valuable property a debtor had was needed to work the land. A practice consequently developed of tenants "pledging" to their landlord in security of their rent the property they had brought onto the land (*invecta et illata*).¹ However, this form of pledge amounted merely to an agreement that if the rent were not duly paid, the landlord should be entitled to take possession of the property.² Probably around the end of the Republic, this arrangement was given force of law by the Praetor Salvius who granted the landlord an interdict (*interdictum Salvianum*) to seize the *invecta et illata*.³ However, this simply amounted to a personal right against the tenant.

Sometime later, but before Hadrian consolidated the Edict in c 130 AD, the right became real when another Praetor, named Servius, granted the landlord an *actio in rem*, the *actio Serviana*.⁴ Later Praetors granted an *actio Serviana utilis* (or *actio quasi Serviana*) in other cases of *hypotheca*. This area of law grew at an explosive

rate, the Romans having even come up with a hypothec resembling the modern floating charge.⁵ However it was Julian when codifying the Edict for Hadrian, who took the last step and made the *actio Serviana* available in all cases of *hypotheca* and *pignus* also.⁶ By the middle of the Second Century AD therefore, *pignus* and *hypotheca* had become *iura in re aliena*.⁷

1. *Nicholas*, p 152.

2. *Ibid*; F Schulz, *Classical Roman Law*, (1951), p 408.

3. *Schulz, ibid*; *Thomas*, p 332.

4. *Ibid*; *Buckland*, pp 472-473.

5. D.20.1.34.pr; *Thomas, ibid*; *Buckland, ibid*, p 475.

6. *Schulz, op cit*.

7. To use the terminology of the Commentators : see *Nicholas*, above, p 141 cf *Buckland*, p 471, note 1.

17. Forfeiture versus collateral security. In the earlier eras of the civil law the property given in security was almost certainly automatically forfeited to the creditor upon non-performance by the debtor¹. Whether the security was *fiducia* or *pignus* does not seem to have mattered.² Support for the existence of the forfeiture type of pledge is found in the Digest where reference is made to the creditor who has the right to sell the property under a special clause giving him the right to sue the creditor for any unrealised deficiency.³ The thesis is that such a clause only existed because initially the creditor had purely the forfeiture right.⁴ Further, evidence of the forfeiture type of pledge is found in the early laws of the Germans and Greeks.⁵

The forfeiture pledge acted as an *in rem* surrogate for any *in personam* rights the creditor otherwise had. This meant that the risk (*periculum*) lay with the creditor. If the property was worth less than the debt, the creditor could not recover the deficiency (*reliquum*) from the debtor. Conversely, if the property exceeded the value of the debt, he could retain the surplus (*hyperocha*).⁶ The inequity here was clear and the forfeiture pledge was consigned to history around the middle of the

Republican era.⁷ Pledge had become a collateral security and forfeiture only occurred if there was an express agreement (*lex commissoria*) to that effect.⁸

The demise of the automatic forfeiture rule meant that the creditor had to stipulate how he intended to realise his security. As just mentioned, he could agree with the debtor on an express forfeiture clause (*lex commissoria*). The alternative was to stipulate for a right to sell (*pactum de vendendo* or *distrahendo*).⁹ Pledge now being a collateral security, the creditor had to account to the debtor for any profit made upon the sale. Similarly, he could sue the debtor for any deficit.¹⁰ The *pactum de vendendo* became implied in the classical era. However, to avoid abuse by the creditor an elaborate system of notice was enacted.¹¹ As for abuse of the *lex commissoria*, this was brought to a halt by the Emperor Constantine abolishing it.¹² The remaining remnant of the concept of the forfeiture pledge had been removed.

1. R J Goebel, "Reconstructing the Roman Law of Real Security" (1961-62) 36 Tul LR 29, 32; Jolowicz and Nicholas, p 302; R Zimmermann, *The Law of Obligations*, (1990), p 223.

2. Goebel, *ibid* p 33.

3. D.20.5.9.1 (Pomponius) and D.46.1.63 (Scaevola).

4. Goebel, p 32.

5. *Ibid* p 33; J H Wigmore, (1897) 10 Harv LR 321, 327-329; (1897) 11 Harv LR 18, 19.

6. Goebel, p 33.

7. *Ibid*.

8. Thomas, p 331.

9. Buckland, p 474; Goebel, p 35.

10. Jolowicz and Nicholas, p 302.

11. Thomas, p 331, Buckland, pp 474-475.

12. Thomas, *ibid*; Zimmermann, p 224.

18. The distinction between *pignus* and *hypotheca*. What has been said thus far is a fairly standard account of the development of the Roman law of real security, upon which there is general academic consensus. However the presence of conflicting

texts in the *Corpus Iuris Civilis*, plus the universally accepted fact that many of the passages in the Digest were interpolated by Tribonian and his compilers, opens the door to scholarly disagreement. In the area with which we are concerned, the greatest controversy is perhaps the inter-relationship between *pignus* and *hypotheca*. The orthodox view is the one which finds support from Ulpian :

*"Proprie pignus dicimus, quod ad creditorem transit, hypothecam, cum non transit nec possessio ad creditorem."*¹

This may be translated as :

"Strictly speaking, we use *pignus* for the pledge which is handed over to the creditor and *hypothec* for the case in which he does not even get possession."²

As the orthodox position, this has certainly been accepted by leading Romanists.³ And it has been accepted by modern Scots law as the orthodoxy too.⁴ Here, however, there is also heterodoxy.

The alternative thesis is that *pignus* and *hypothec* are capable of being condensed into the same notion.⁵ Support for this may be found in the following opinion of Marcianus :

*"Inter pignus autem et hypothecam tantum nominis sonus differt."*⁶

This translates as :

"The difference between *pignus* and *hypotheca* is purely verbal."⁷

Persuasive arguments may be adduced to discredit the traditional dichotomous approach. In the first place, it was formerly believed that *hypotheca*, due to its Greek name, was a legal transplant from the law of ancient Greece.⁸ This is now generally accepted to be untrue.⁹ Secondly, the *actio Serviana* (the relevant real action) was common to both.¹⁰ Indeed, the word *pignus* occurs in the *formula* of the action.¹¹ Leading on from this and thirdly, whereas *hypotheca* grew out of *pignus*, *pignus* only became a real right through *hypotheca*.¹² Fourthly and crucially, the

passages set out above from Ulpian and Justinian both use the similar expressions "strictly speaking" and "properly" which indicate that *pignus* and *hypotheca* were used interchangeably.¹³ Fifthly, it is argued that the discrete categorisation represents the Justinianic rationalisation of the law and not what the situation was in classical Rome.¹⁴ Sixthly, it has been doubted whether the above passage attributed to Ulpian did indeed come from his pen.¹⁵ At any rate, the same great jurist writes elsewhere :

*"Pignus contrahitur non sola traditione, sed etiam nuda conventione, etsi non traditum est."*¹⁶

This translates as :

*"Pignus is contracted not only by delivery but also by mere agreement even in the absence of any delivery."*¹⁷

These arguments are cumulatively powerful. Goebel's analysis is difficult to resist :

". . . Roman law in both its classical and post-classical eras knew only one basic form of real security. Whether this form was known as *pignus* or *hypotheca* or both, or whether preferred usage required *pignus* to indicate possession in the creditor and *hypotheca* . . . to indicate possession in the debtor, is a topic of fairly minor importance. . . Accordingly, it is quite inappropriate to speak of the legal rules of *pignus* or the legal rules of *hypotheca* as such. It is preferable to adopt a neutral terminology and present the doctrines applicable to pledge as a whole, organized in categories strictly according to the basic factual situations which engender these doctrines."¹⁸

1. D.13.7.9.2.

2. Translation from T Mommsen, P Kruger and A Watson (eds), *The Digest of Justinian* (1985) Pennsylvania (4 vols). See also Inst.4.6.7.

3. For example, *Buckland and Thomas, op cit.*

4. *Stair*, I.13.11; W M Gloag and R C Henderson, *The Law of Scotland*, (10th ed, 1995), chapter 19.

5. See Wigmore, (1897) 11 Harv LR 18, 21-25; Goebel, (1961-62) 36 Tul LR 29, 37-44; Nicholas, above, p 152; *Jolowicz and Nicholas*, p 303.

6. D.20.1.5.1.

7. Translation from *Mommsen et al.*

8. See Jolowicz and Nicholas, p 303. This was the prevalent view amongst the older writers, for example, R Sohm, *Institutes of Roman Law*, (trans J C Ledlie, 3rd ed, 1907), p 354. W Burdick, *Principles of Roman Law and Their Relation to Modern Law*, (1938), p 381 adheres to this view.

9. *Goebel*, p 35; *Thomas*, p 332; Nicholas, above, p 152.

10. *Nicholas, ibid; Thomas, ibid; Buckland*, pp 472-473.

11. *Jolowicz and Nicholas*, p 303.

12. That is, the *actio in rem*, the *actio Serviana* was available to a hypothecary creditor before being available to a pledgee : *Buckland*, pp 472-473; *Schulz*, p 408.

13. Or at least *pignus* was. See *Wigmore*, (1897) 11 Harv LR 18, 23 n 3.

14. *Goebel*, pp 30-31. Wigmore's thesis in fact is that *hypotheca* was used as a substitute for *fiducia* in the Digest, in other words that that *fiducia* by Justinian's time had become absorbed into *pignus* : *Wigmore ibid*, at pp 381-383. However, this ultra radical revisionism has been questioned : *Goebel*, pp 41-43.

15. G F Puchta doubts this : *Pandekten*, (12th ed, 1877), p 193. See *Wigmore*, p 23 n 3.

16. D.13.7.1.pr.

17. Translation based on that in *Mommsen et al.*

18. *Goebel*, p 44.

19. A unitary law of pledge. Another important point about *pignus* and *hypotheca* is that each was competent for both immoveable and moveable property.¹ Here, for example, is Burdick :

"In Roman law, both *pignus* and *hypotheca* applied to movables and immovables alike. The notion entertained by some that *pignus* applied only to movables while *hypotheca* applied exclusively to immovables, is erroneous. Each applies to both classes of property."²

The modern Scots law of pledge, it goes without saying, is only applicable to moveables. As regards heritable property, the standard security is the only

competent method of securing an obligation upon land in Scotland.³

1. *Thomas*, pp 332-333; *Wigmore*, p 22; *Buckland*, pp 475-476.

2. W Burdick, *Principles of Roman Law and Their Relation to Modern Law*, (1938), p 382. See also W M Gordon, "Roman Influence on the Scots Law of Real Security", in R Evans-Jones (ed), *The Civil Law Tradition in Scotland*, (1995), p 157, at pp 158-159. In Louisiana today, *pledge* remains a general term for security. A pledge of moveables is known as *pawn* and one of immoveables as *antichresis*. See R Slovenko, "Of Pledge", (1958) 33 Tul LR 59.

3. Conveyancing and Feudal Reform (Scotland) Act 1970 (c 35), s 9(3).

(c) Early Scots law

20. General. The development of our law in the medieval era is a matter of controversy. On the one hand there is the thesis of Lord Cooper of Culross and Professor William Croft Dickinson, at one time the undisputed orthodoxy.¹ On the other hand there is that of the revisionist Mr W D H Sellar, Professor Hector MacQueen and others.²

Both sides are agreed that by the time of the early fourteenth century, the legal statesmen of Scotland were engaged in the construction of a legal system founded upon Anglo-Norman law.³ However, for Lord Cooper and his school of thought this was to turn out as a "false start"⁴ to the development of our law because of the onset of the Wars of Independence.⁵

For Lord Cooper the law of Scotland, certainly prior to the time of the Reception of Roman law and perhaps even before Stair wrote his *Institutions* in 1681, was not of great importance, other than to the legal historian. As he writes in succinct terms in his pamphlet, *The Scottish Legal Tradition*, "[f]or present purposes we cannot ignore pre-Stair law, but we need not linger beside it".⁶

The revisionist school has seriously called into question the existence of a "Dark Age" in our legal history. For its members the time around the thirteenth, fourteenth and fifteenth centuries is no less than the formative period of the Scots law which we know today.⁷ To the revisionist then, a study of the early Scots law of pledge is a matter of far more than academic interest.

1. See Lord Cooper, *Selected Papers*, (1957), pp 219-236; H L MacQueen, *Common Law and Feudal Society*, (1994), pp 2ff.
2. See W D H Sellar, "A Historical Perspective" in S C Styles (ed), "The Scottish Legal Tradition", (2nd ed, 1991), pp 29-57 esp p 30; W D H Sellar, "The Common Law of Scotland and the Common Law of England" in *The British Isles 1100-1500 : Comparisons Contrasts and Connections*, ed R R Davies, (1988), pp 82-99; MacQueen, *ibid*.
3. MacQueen, *ibid*.
4. Lord Cooper in *The Scottish Legal Tradition*, (2nd ed, 1991), p 70.
5. *Ibid*, p 68.
6. *Ibid*, p 67.
7. See MacQueen, *op cit*.

(i) *Regiam Majestatem*

21. **General** In the history of Scots law, few treatises have generated greater controversy than the *Regiam Majestatem*. The fact that it is a collection of old laws written in Latin is beyond question. However, the date of the work and its accuracy as an account of medieval Scots law are matters upon which there has been significant dissensus.¹ As to the first of these, c 1318 seems the likeliest time of publication.² However, with regard to accuracy, the basic problem is that much of *Regiam* has been copied from the English work of c 1187, the *De Legibus et Consuetudinibus Angliae* of Glanvill.³ Thus Stair regarded it as "no part of our law".⁴ However, this statement is somewhat exaggerated, given that he was clearly aware of the influence of English law upon our legal system.⁵ As Sellar writes, "*Regiam Majestatem* was an important, although not necessarily authoritative, repository of Scottish customary law."⁶ Further, its influence on later works is not difficult to show.⁷

Pledge merits five chapters in Book 3 of *Regiam*.⁸ The terminology used is very interesting. The word used for pledge is *vadium*. *Pignus* does get a passing reference in the title to chapter 2, in the derivative form *pignoris*. It reads :

"De rebus creditis et mutuo dato sub vadii vel pignoris positione"

The use of "vel" ie "or" suggests that *vadium* and *pignus* were alternatives. However, in the body of the text it is *vadium* which is used. The origin of the word *vadium* is not difficult to trace and indeed has been dealt with previously, in the discussion of etymology.⁹ *Vadium* is the Latin term used by English law to mean pledge. It was in the Middle Ages and is today.¹⁰ Further, the fact of the matter is that chapters 2 to 6 of Book 3 of *Regiam* are based closely upon parallel passages in *Glanvill*.¹¹

1. See Lord Cooper's introduction to *Regiam Majestatem*, (Stair Soc vol 11, 1947, ed Lord Cooper); A A M Duncan, "*Regiam Majestatem*. A Reconsideration" 1961 JR 199; P Stein, "The Source of the Romano-canonical part of *Regiam Majestatem*" SHR xlviii (1969), 107; A Harding, "*Regiam Majestatem* among Medieval Law-Books" 1984 JR 97; H L MacQueen, *Common Law and Feudal Society*, (1993), pp 89-98.

2. *MacQueen*, pp 90-91.

3. See texts cited in note 1. The edition of *Glanvill* is G D G Hall (ed), *Tractatus de Legibus et Consuetudinibus Angliæ qui Glanvilla vocatur*, (1965).

4. *Stair*, I.1.16. See also Craig, *Jus Feudale*, (1603; 1934 edition, translated by Lord Clyde), I.8.11.

5. See W D H Sellar, "English Law as a Source", in *Stair Tercentenary Studies*, (Stair Soc vol 33), pp 140-150. See also his contribution to *The Scottish Legal Tradition*, (2nd ed, 1991), entitled "A Historical Perspective", p 29, at p 39.

6. *Ibid*, p 144.

7. In particular Balfour's Practicks. See below, paras 35-36. *Regiam* has been cited in court in the twentieth century : *Lord Advocate v University of Aberdeen & Budge* 1963 SC 533.

8. These may be found at pp 192-198 of Lord Cooper's edition.

9. See above, para 8.

10. For the Middle Ages, see F Pollock and F W Maitland, *The History of English Law before Edward I*, (2nd ed, 1896, reprinted 1968), vol 2, p 117 and A W B Simpson, *An Introduction to the History of the Land Law*, (2nd ed, 1986), p 141. For today, see N E Palmer, *Bailment*, (2nd ed, 1991), chapter 22.

11. That is, *Glanvill*, X.6-10.

22. The old English law. As it is clear that the old English law heavily influenced *Regiam*, it will be convenient to allude to it here and to make reference to it in future paragraphs. This is particularly helpful because some scholarship has been already carried out on the matter.¹ Whereas *vadium* was the relevant Latin term, the English

one was *gage*. This word came over from France after William the Conqueror and must have quickly established itself as the term for pledge, as there are references to gages of land in the Domesday Book.² It appears that the Anglo-Saxon term for pledge was *wed*, and in actual fact this shares the same Germanic roots as *vadium* and *gage*.³ The early English law of pledge was unitary in respect of moveables and immoveables.⁴

1. See F Pollock and F W Maitland, *The History of English Law before Edward I*, (2nd ed, 1968), vol 2, pp 117-124; A W B Simpson, *An Introduction to the History of the Land Law*, (2nd ed, 1986), pp 141-143; T F T Plucknett, *A Concise History of the Common Law*, (5th ed, 1956), pp 603-609.

2. Plucknett, p 603; Pollock and Maitland, p 118. Apparently, one of the cases involved one Eadric having gaged land to the Abbot of St Benet.

3. Pollock and Maitland, p 117.

4. Glanvill, X.6.

23. A unitary law of pledge. *Regiam* states categorically that both moveable and immoveable property may be pledged.¹ The exact wording used is "put into pledge", in Latin, "*ponuntur in vadium*". It has already been suggested that *ponere*, the verb to put, is a precursor of "pawn".² The fact that *Regiam* recognises pledge as a security in respect of both land and moveables is very important. It is suggestive of Roman influence. For, as we have seen, the civil law treated pledge as a unitary concept.³ Moreover, the approach in *Regiam* makes the point that the law of real security like the law of property in general has a unitary foundation. As to the accuracy of the account here, Erskine seems to have been in no doubt. He uses *Regiam* as the authority for this statement of the early law of heritable security in Scotland :

"Originally the property of the lands . . . remained with the debtor, agreeably to the genuine nature of impignoration : it was the possession only which was transferred to the creditor for his security."⁴

Whilst the basic law of pledge applied equally to moveables and immoveables, *Regiam* does set out some particular rules restricted to each type of property. In respect of land, a pledge could be a *mortuum vadium*, which Lord Cooper translates

as "mortgage".⁵ The correct translation should be "dead-pledge", for he translates *vadium* into "pledge" everywhere else. "Mortgage" is the correct translation for the English lawyer, because "gage" was a term of art in medieval law, as too "mortgage" became. *Regiam* defines a mortgage as a pledge where the fruits and rents received by the creditor as interest do not reduce the principal debt.⁶ Thus, the pledge is "dead", because its profits do not go towards the discharge of the debt.

Mortgages are regarded as usurious arrangements. Although not prohibited by the King's court, a Christian creditor sins by entering into a mortgage. If he dies while the mortgage is current his property is disposed of in the same way as that of a usurer.⁷ After setting out the rules on mortgage, *Regiam* states that aside from these rules the law on pledging immoveables are "the same as in the case of the pledge of moveable goods".⁸ The unitary nature of the medieval Scots pledge is again underlined.

1. *Regiam Majestatem*, III.2.1.

2. See above, para 9.

3. See above, para 19.

4. *Erskine*, II.8.4. See also W M Gordon, "Roman Influence on the Scots Law of Real Security", in R Evans-Jones, (ed), *The Civil Law Tradition in Scotland*, (1995), p 157, at p 159.

5. *Regiam Majestatem*, III.2.5. See Stair Soc vol 11 (ed Lord Cooper), p 193. Although III.2 indicates that both moveable and immovable property could be mortgaged, in practice it was just immoveables. See III.5.

6. *Regiam Majestatem*, III.2.5.

7. *Ibid*, III.5.4.

8. *Ibid*. Note, however, also the rules governing the situation where pledged land is wrongously withheld from the pledger : *Regiam Majestatem*, III.6.

24. The need for delivery. Chapter 2 of Book 3 of *Regiam* states that in pledge the subject matter of the security is either immediately delivered by the debtor to the creditor on receipt of the loan, or it is not so delivered. This has clear echoes of *pignus* and *hypotheca*¹ and suggests a flexible approach. In practice, however, delivery was a necessity, because chapter 4 provides :

"When a bargain has been made between debtor and creditor regarding the pledging of some thing, if the debtor after having received the loan fails to deliver the pledge, what action is open to the creditor in such circumstances, especially in view of the risk that the same thing may have previously been pledged, and may again be pledged, to other creditors ? Upon this point it must be noted that the King's court is not in use to take cognisance of or warrant such private bargains about the giving or receiving of pledges, or other agreements if made out of court, or made in some court other than the King's court. Therefore if such agreements are not observed, the king's court does not interfere; and hence it is not bound to determine the rights of different creditors, prior or postponed, or their respective preferences."²

From this it is clear that agreements resembling *hypotheca* were unenforceable.³ The long obsession of Scots law with the maxim "no security over moveables without possession" had begun.⁴

Lord Cooper is rather sceptical as to what extent the King's courts would ignore such agreements.⁵ Skene suggested that the sheriff and barony courts would act as enforcement agencies, but there is really no direct evidence on the matter.⁶ However, the English authorities are clear that there must be delivery.⁷ Glanvill demands it, for otherwise the property might be pledged to successive creditors, resulting in a situation much too complex for royal justice to resolve.⁸ As we shall see, later authority indicates this is the Scottish position and it is therefore felt that the wording of chapter 4 is far from being inaccurate.⁹

1. See above, para 18.

2. *Regiam Majestatem*, III.4.4-6.

3. At least in the royal courts.

4. A point which has also been made by Professor Gordon, in "Roman Influence on the Scots Law of Real Security", in R Evans-Jones, (ed), *The Civil Law Tradition in Scotland*, (1995), p 157, at p 168. For a discussion of the principle see *Gloag and Irvine*, chapter 7.

5. *Regiam Majestatem*, (1947 ed), p 196.

6. *Ibid.* Professor Gordon suggests that action could be taken in the ecclesiastical courts : "Roman Influence on the Scots Law of Real Security", *op cit*, n 4, at p 161. Once again, however, there is no clear evidence.

7. *Pollock and Maitland*, vol 2, p 120; *Plucknett*, pp 603-604; *Simpson*, p 141.

8. *Glanvill*, X.8.

9. In particular Balfour's *Practicks* and the later obsession of Scots law with "no security without possession".

25. Rights and obligations. There exists in *Regiam* a basic division between a pledge for a limited period and one for an unlimited period.¹ Thus a pledge could secure a term or an on-demand loan. With both types of pledge, the pledgee is under the same duty of care in respect of the property. He must keep it in safe custody and is not allowed to make use of it nor do anything to it which will cause it to deteriorate. He is liable to the pledger for any deterioration which is his fault.² Where the pledged property is something which requires expense, for example, an animal needing to be fed, it is a matter for the parties to decide who must bear this cost.³ *Regiam* does not state who is liable if there is failure to come to an agreement.⁴

1. *Regiam Majestatem*, III.2.1, III.3 and III.4..

2. *Ibid*, III.3-4.

3. *Ibid*, III.3.3.

4. Cf the modern position, below, para 99.

26. Enforcement. Where property is pledged for a stated period the parties may agree that it becomes the creditor's on default.¹ In the absence of such an agreement, the creditor may bring the debtor to court. If the pledge is admitted by the debtor, he will be given a fixed period to discharge the debt. If he fails to do this, the property becomes the creditor's. If the debtor denies that the property is indeed his, it falls to the creditor. If the debtor denies the pledge, the onus is on the creditor to prove that the property was pledged as loan security.

What can be seen here is that the pledge set out in *Regiam* appears to be a forfeiture pledge rather than a collateral security pledge. It may be recalled that Roman law in the 4th century AD by the order of Constantine had ruled out forfeiture as a remedy for the creditor.² If *Regiam* was a true reflection of the medieval law, then these

forfeiture rules make it seem jurisprudentially backward.

1. *Regiam Majestatem*, III.3.4-11. Presumably the same rules applied for a pledge for an indefinite period, as III.4 is silent on the matter.

2. See above, para 17; W M Gordon, "Roman Influence on the Scots Law of Real Security", in R Evans-Jones, (ed), *The Civil Law Tradition in Scotland*, p 157, at p 162..

27. A real right ? A very important question which requires an answer is whether the medieval pledge was a real right. Now of course this terminology is bound to be absent from the text as it is neo-Romanist and the reception of Roman law was still to come.¹ However, the notion is straight-forward enough. Could the creditor assert possessory rights over the property against a singular successor of the debtor and the world in general ? The answer as regards the English gagee was in the negative.² He was not permitted to use the relevant action to protect his possession : the *briefe of novel disseisin*.³ So if a stranger dispossessed him, it was the gagor who had the remedy. If the gagor himself chose to dispossess the gagee, the latter had no remedy and was reduced to being an unsecured creditor.⁴

The reason given for not allowing the gagee to regain possession was that in reality he was entitled to the debt and not the property. If the court could award the creditor his money then it did not require to award him possession.⁵ This is all very well in an insolvency-free utopia. However insolvency existed in medieval England as it does today.⁶ The technical reason why the creditor had no possessory remedy was simply that he was not regarded as being in possession.⁷ For the Roman law of *pignus* filtering into medieval England at the time came from the Italian glossators who denied that a pledgee exercised possession over the property he was detaining in security.⁸ Given the lack of remedy, it was therefore unsurprising that the gage in this form fell into disuse.⁹

In the case of Scotland, the passage in Glanvill which denies the pledgee a possessory remedy against the pledger and third parties has not been transplanted into *Regiam*.¹⁰ Further, Lord Cooper states that there is "no evidence in Scottish records" that the debtor could reduce the creditor from being a secured creditor to being an unsecured creditor by merely ejecting him from the pledged property.¹¹ Now of course the silence in the records does not necessarily mean anything; indeed

the position could be the reverse. However, these two pieces of evidence could suggest that the medieval Scots pledgee might have had the real right which his English counterpart certainly had not. Be that as it may, given the great influence of the Norman law, it is very difficult to make any definite conclusion on the matter.

1. The Reception of Roman law came in the sixteenth and seventeenth centuries. See P Stein, "The Influence of Roman Law on the Law of Scotland" 1963 JR 205.

2. *Glanvill*, X.11.

3. *Ibid*; *Simpson*, p 142.

4. *Pollock and Maitland*, vol 2, pp 120-121.

5. *Ibid*.

6. Consequently, the gage in this form died out as it was ineffective.

7. *Glanvill*, X.11; *Pollock and Maitland*, *ibid*.

8. *Pollock and Maitland*, p 121 n 2; Bracton, *De Legibus et Consuetudinibus Angliae*, (ed G E Woodbine, trans with revisions and notes by S E Thorne, 1968-1977), f 268.

9. *Simpson*, p 142.

10. *Glanvill*, X.11.

11. *Regiam Majestatem*, (1947 ed), p 195.

(ii) *Leges Quatuor Burgorum*

28. General. The collection of laws of the Scottish burghs is another piece of early Scottish authority.¹ The title comes from the original four burghs from where the laws emanated : Berwick, Edinburgh, Roxburgh and Stirling. The *Leges Quatuor Burgorum* has been traditionally attributed to the reign of David I (1124-1153), but it is most probably a later piece of work, maybe even as late as the thirteenth century.² Even so, this would make it earlier than *Regiam* (c 1318) and the question may be asked why *Regiam* was examined first. The reason was that in terms of the Scottish history of the last eight hundred years the works are broadly contemporaneous and it was felt more appropriate to treat the one which deals with laws enforced by the royal courts before the one which deals with those enforced by the courts of the burghs.³

1. It may be found in T Thomson and C Innes (ed), *The Acts of the Parliaments of Scotland*, vol 1, (1814), 327-356.
2. H L MacQueen, *Common Law and Feudal Society*, (1993), p 87; cf D M Walker, *A Legal History of Scotland*, vol 1, (1985), p 95.
3. *Regiam* seems *prima facie* more important as its scope is not confined to the burghs.

29. Specific references to pledge. There is only one title out of the 119 which treats pledge and it deals exclusively with land. It is title 79. Like *Regiam*, the *Leges Quatuor Burgorum* is in Latin. *Vadimonium* is used for "pledge". This surely confirms the link between *vadium* and *vadimonium* already suggested and further the English influence on medieval Scots law.¹ The term *impignorata* makes one appearance as a synonym for *vadimonium*, which suggests as with *Regiam* that *pignus* had made some sort of impact, if not much.

Although, the *Leges Quatuor Burgorum* was indeed originally a Latin work, a parallel text in old Scots exists. This text uses the terms *wed* and *wedset* for pledge. Now, as we have seen, *wed* was actually the term for pledge in Anglo-Saxon England, to be replaced by *gage* after 1066, although both terms share the same Germanic root.² The English influence is seen once more.

Title 79 states :

If any man has land pledged to another he may discharge the pledge when ever he pleases except if it is pledged for a certain term. And when that term comes he shall be given the opportunity at three head courts to redeem his pledge. And if he does not redeem it, it shall be sold and the creditor shall take his debt. And all that he gets which exceeds the debt shall be given to him that owned the pledge."³

It is interesting to note the grace period which the debtor is given after the loan becomes due for repayment. What however is most striking in comparison with *Regiam* is that pledge is clearly treated as a collateral security. As we have seen, *Regiam*, appears to regard forfeiture from pledger to pledgee as the remedy if the latter defaults on the loan.⁴ As a matter of justice, the *Leges Quatuor Burgorum*

seems to be ahead of *Regiam*.⁵

1. The English influence has been alluded to before, for example in para 21.

2. *Pollock and Maitland*, vol 2, p 117.

3. My translation from the Latin and old Scots text at APS, vol 1, 349. On the "head courts", see D M Walker, *A Legal History of Scotland*, vol 2, (1990), p 294.

4. *Regiam Majestatem*, III.3.4-11.

5. It is unclear whether this was due in any extent to Roman influence.

(d) The Period From 1400 To Stair

30. General. As will be seen, this period was one in which the law of pledge gradually developed.¹ At a more general level, the most important occurrence was the establishment in 1532 of the College of Justice and the concurrent development of the Court of Session.² Their foundation gave rise to case law which slowly and surely helped shape pledge into its modern form.

1. For a discussion of this period in general, see D M Walker, *The Scottish Legal System*, (7th ed, 1997), pp 99ff.

2. See R K Hannay, *The College of Justice*, (1990); D M Walker, *The Scottish Legal System*, (7th ed, 1997), pp 102-103; J S H, "The Scottish College of Justice in the 16th century" (1934) 50 LQR 120.

31. *Acta Dominorum Auditorum*. This collection of the Acts of the Lord Auditors of Causes and Complaints between the years of 1466 and 1494 contains the three earliest reported Scots pledge cases.¹ The word used for *pledge* in the reports is *wed*, the same as in the *Leges Quatuor Burgorum*. The items pledged were precious metallic objects, in particular silverware.² In *Cokburn v Twedy of Drumelior*³ and *Fleming v Lord Crechton*⁴ the Lord Auditors order pledged property to be restored to the pledger on his discharge of the debt which the pledge secured.⁵

*Elsbeth of Douglas v Wach of Dawik*⁶ appears to be an early example of the application of the rule *nemo plus juris ad alienum transferre potest, quam ipse habet*.⁷ The Lord Auditors decree that that Wach shall deliver to Elspeth a gold chain which one David Redehuch had pledged to him. A day is set down for Elspeth

to prove that she owns the chain. The Lord Auditors leave Wach with a personal action for his relief, presumably against David Redehuch.

The conclusions which may be drawn from the cases in the *Acta Dominorum Auditorum* are that pledges, certainly of precious metallic objects, took place in the fifteenth century and that the Lord Auditors were prepared to intervene to prevent proprietary rights from being infringed in the course of such transactions.

1. *Acta Dominorum Auditorum :The Acts of the Lord Auditors of Causes and Complaints 1466-1494*, (ed T Thomson), (1839).

2. For example, in *Cokburn v Twedy of Drumelior* (1478) ADA 65, one of the pledged items was a silver cup.

3. (1478) ADA 65.

4. (1479) ADA 87.

5. See D M Walker, *A Legal History of Scotland*, vol 3, (1995), p 602.

6. (1484) ADA * 149.

7. See below, para 67.

32. The giving in security of Orkney and Shetland. In 1468 King Christian of Norway conveyed Orkney to Scotland. In 1469 he did the same with Shetland. The islands were to secure the wedding dowry of his daughter who was to marry King James III.¹ The security created by each conveyance has variously been described as that of pledge, pawn, wadset, mortgage and impignoration.² On examination of the relevant documents which are in Latin, the terms used to mean security are *pignore* and *ypotheca* and derivatives thereof.³ Their origins are clearly Roman. It is interesting to note that the legal draftsman of the day was using these terms. For although, *pignus* made a single appearance in both *Regiam* and the *Leges Quatuor Burgorum* the general term used to denote security, or at least pledge, was *vadium*.⁴ However, an examination of similar contemporary documents giving land in security leads to the discovery of the same terms which were found in the Orkney and Shetland charters.⁵

The clue to what the precise nature of the security was lies in a basic knowledge of political geography. In 1997 Orkney and Shetland are still part of Scotland. They were never redeemed by Norway.⁶ Now, if Scotland has title to the islands the contracts could never be ones of pledge in the strict sense of the word, because in pledge ownership of the pledged property remains with the pledger.⁷ The relevant security is actually wadset.⁸ Its roots lie in pledge, as set out in *Regiam*.⁹ However, the adoption by Scotland of the feudal system meant that a mere transfer of possession of land would not give the creditor a nexus upon it. He had to become part of the feudal chain, so a conveyance *a me* or *de me* was required.¹⁰ Pledge and wadset thereupon conceptually parted company.

1. See generally, B E Crawford, "The Pawning of Orkney and Shetland" (1969) xlviii Scottish Historical Review 35.

2. W D H Sellar, "A Historical Perspective", in *The Scottish Legal Tradition*, (2nd ed, 1991), p 43, describes it as a *pledge*. So too does J Ryder in *SME*, vol 24 *sv* "Udal Law", para 302. T B Smith at para 326, uses *pledge* and *impignoration*. J Mooney in *Viking Congress*, (ed W D Simpson, 1954), pp 82-83 uses *mortgage*. G Donaldson, "Problems of Sovereignty and Law in Orkney and Shetland" in *Miscellany II*, (Stair Soc vol 35, 1984) 13, 20 uses *pledge*, *impignoration* and *wadset*. Crawford, *op cit*, uses all five terms.

3. For the Orkney deed, see J Mooney, *Kirkwall Charters*, (1952), pp 96-102, esp pp 100-101. For the Shetland deed, see Crawford, *op cit*, at pp 52-53.

4. See above, paras 21 and 31.

5. See the deeds discussed by D M Walker in *A Legal History of Scotland*, vol 2, (1990), pp 684-688.

6. There is actually dispute amongst historians over whether Norway ever intended to redeem : compare Crawford, *op cit* n 1 and Donaldson, *op cit* n 2.

7. *Erskine*, III.1.33; Bell, *Principles*, s 1364.

8. On wadset generally, see *Stair*, II.10; Walter Ross, *Lectures on Conveyancing*, (2nd ed, 1822), II.330; G L Gretton, *SME*, vol 18, para 112.

9. See above, paras 21-27.

10. See authorities cited in n 8, as well as D M Walker, *A Legal History of Scotland*, vol 3, (1995), pp 784-788.

33. The wad-wife. The sixteenth century saw the appearance in Scotland of the *wad-wife*.¹ This was a lady merchant and moneylender, one of whose business

interests was the giving of loans to clients who would for security pledge some of their moveable property to her. Wad-wives received specific mention in Burgh Records of Edinburgh.² One wad-wife was Janet Fockhart whose place of business was in one of the closes off Edinburgh's High Street.³ The pieces of property which were pledged to her were similar to those which were the subject matter of the decisions in the *Acta Dominorum Auditorum* : small precious items.⁴ For example, Lady Orkney, wife of Robert Stewart, Earl of Orkney pledged a diamond ring, a chain and a pointed diamond ring for £100.⁵ When Fockhart died in May 1596, a large amount of jewellery was in her possession, much of which was probably unredeemed pledges.⁶ Another wad-wife was Elspeth McNair who was a contemporary and neighbour of Fockhart's in Edinburgh. She appears, however, to have run a smaller operation. Fockhart left £22467-3s-9d on her death; McNair £663.⁷

The wad-wife can be seen as a forerunner of the pawnbroker, although she does not seem to have been subject to any specific form of regulation. It appears that the pledges made to wad-wives were forfeiture pledges : nothing can be found to suggest otherwise.⁸ However, such a hypothesis is consistent with legal writing of the time.⁹

1. See D M Walker, *A Legal History of Scotland*, vol 3, (1995), p 718.

2. *Extracts from the Burgh Records of Edinburgh 1403-1528*, (1869), 106 (3rd October 1505); *Extracts from the Burgh Records of Edinburgh 1573-1589*, (1882), 28 (26th October 1574).

3. See M H B Sanderson, *Mary Stewart's People*, (1987), pp 91-101.

4. See above, para 31.

5. *Op cit*, n 3, at p 100.

6. *Ibid.*

7. *Op cit*, n 3 at p 101.

8. For example, any records of a wad-wife exposing pledged property to public sale on default upon the loan secured and thereafter paying any excess money raised to the pledger.

9. See Balfour's *Practicks*, below para 35.

34. The Burgh Records. In the sixteenth century, the Records of the Scottish Burghs contain various references to pledge. Varying as these references are, a recurrent feature is the use of *wed*, or a derivative, to mean pledge.¹

A fascinating account of life in the 1500s may be gained from the Records. When the plague hit Edinburgh on several occasions the council prohibited the pledging of clothes and similar items and provided for harsh punishment to be meted out to anyone not obeying their pronouncements. The following comes from 25th May 1530 :

"Item, that na maner of parsonis man nor woman tak ony claith in wedd fra vtheris, or by ony auld clais, wou or lynnyn, vnder the pane of burning of thar chekis and banasing of the toun for all the dayes of thar lyffis."²

On another occasion the council provided that anyone caught breaking the rule for the second time would face death.³ The Draconian nature of these penalties shows how concerned the city fathers were about the spread of pestilence.

The Lanark Burgh Records give an account of a complaint by one Archibald Douglas against one James Douglas in respect of the alleged wrongful withholding of a sword and two gilded knives pledged by the former to the latter a year before.⁴ The complainant argued that the items should be returned upon his payment of the secured debt. Unfortunately, the Records do not tell us if and how the matter was resolved.

The Stirling Burgh Records refer to a couple of instances of pledge. One was when the council ordained that a piece of property known as the chalice of St James's altar and St Peter's chalice was to be sold at 20 shillings per ounce.⁵ The money raised was to be used for repairing the calsay, that is the paved area of the town, except for four pounds which was to be paid to Baillie Johne Leschewan to whom the St Peter's chalice was pledged for that sum. What is interesting about this is the fact that it is the council, the debtor, and not the baillie, the creditor, which is doing the selling. This appears to confirm the fact that sale by the creditor upon default was not a recognised remedy in medieval Scotland.⁶ The normal remedy was forfeiture of the property, either stipulated for in the contract of pledge or by court order.⁷

Nevertheless, this case shows that forfeiture was not the remedy every time. Indeed, it is an example of pledge acting as a collateral security.

The other case involved a gold chain weighing $6\frac{3}{4}$ ounces which belonged to Lady Caterne, Countess of Ergile.⁸ It had been pledged to one Thomas Wallace, tailor and burghess of Stirling for 120 merks. The redemption of the chain is recorded. However, it is not the countess who redeems it, but one Patrick Grahame on behalf of one Master Johne Carswele. Grahame warrants that he will relieve Wallace, his heirs, executors and assignees in the event of any action by the countess or any others in respect of the chain. It can only be conjectured what is going on here, because in principle it is only the pledger and not a third party who may take the property from the pledgee on payment of the debt.⁹ Most probably the time for Lady Caterne to perform her obligation has passed and the chain has been forfeited to Wallace. He is presumably worried in case there has been any irregularity and insists that Grahame will indemnify him if Lady Caterne takes any action.

1. For example, *Extracts from the Burgh Records of Edinburgh 1403-1528*, (1869), 106, (wed); *Extracts from the Burgh Records of Lanark 1150-1722*, (1893), 53 (wed); *Extracts from the Burgh Records of Stirling 1519-1666*, (1887), 78 (wod).

2. *Extracts from the Burgh Records of Edinburgh 1528-1557*, (1871), 28. See also at 41 and 44 and *Extracts from the Burgh Records of Edinburgh 1403-1528*, (1869), 106.

3. *Extracts from the Burgh Records of Edinburgh 1573-1589*, (1882), 28 (26th October 1574).

4. *Extracts from the Burgh Records of Lanark 1150-1722*, (1893), 53 (15th February 1570-1).

5. *Extracts from the Burgh Records of Stirling 1519-1666*, (1887), 78 (10th April 1561).

6. See *Stair*, I.13.11 and below, para 37.

7. See above, para 26 and below, para 36.

8. *Op cit*, n 5 at 79 (4th November 1561).

9. Simply because it is the pledger who retains ownership of the property. Only possession is transferred to the creditor : *Regiam Majestatem* III.3; Balfour, *Practicks*, p 194.

Balfour's Practicks

35. **General.** In his *Practicks*, Sir James Balfour of Pittendreich gives an account of the law of Scotland up to 1579.¹ Unlike *Regiam* and the *Leges Quatuor Burgorum*

the text is originally Scots and not Latin.² Under the heading "Anent pledgis and cautioneris", Balfour treats caution, that is personal security.³ And in the body of the text there are numerous uses of the word *pledge*.⁴

This raises the question whether *pledge* was in widespread use as the term for caution in medieval Scotland. On investigation, it is not difficult to corroborate Balfour's use of the word. For, on scrutinising the Latin of *Regiam* once more and not Lord Cooper's translation, it can be seen that *plegius* is the term used for caution.⁵ The same term is used in the parallel passages in Glanvill.⁶ According to the leading historians of English law, *pledge* was the term in Norman England for personal security, *gage* of course being the term for security over a thing.⁷ *Pledge* is said to have replaced the Anglo-Saxon term, *borh*.⁸ To complete the picture, this term has been taken into the *Leges Quatuor Burgorum* as *borch* in the old Scots version as a translation of *plegius*.⁹ These terms are used for caution.¹⁰ Balfour himself uses the variant, *borgh*.¹¹

Two conclusions may be drawn. Firstly, the English influence on Scots law continues apace. Secondly, the distinction between the law of personal security and the law of real security in both medieval Scotland and England was somewhat blurred terminologically, if not in other respects.

1. Balfour, *Practicks*, (Stair Society, vols 21 and 22, 1962-63, ed P G B McNeill). For the date of Balfour's work, see this edition at p xxxii and also D M Walker, *The Scottish Jurists*, (1985), pp 33-53.

2. See above, paras 21 and 29.

3. See pp 191-194. See also the matter discussed at p 338 *et seq* under the heading "Anent replegiatoun".

4. For example, in the very first sentence under "Anent pledgis and cautioneris", (c 1), which reads " . . . gif ony man is borgh and pledge for ane uther . . . "

5. For example, at Book 3, chapter 1. And see D M Walker, *A Legal History of Scotland*, (vol 1, 1988), pp 342-344.

6. For example, *Glanvill*, X.5.

7. F Pollock and F W Maitland, *The History of English Law before Edward I*, (2nd ed, 1896, reprinted 1968), vol 2, p 185 fn 2; T F T Plucknett, *A Concise History of the Common Law*, (5th ed, 1956), p 628.

8. *Ibid.*

9. For example, at title 87 (T Thomson and C Innes (ed), *The Acts of Parliament of Scotland*, (12 vols, 1814-75), (APS), vol 1, 350).

10. The most cursory examination of the text bears this out.

11. At page 191, (c 1), first sentence.

36. Specific references to pledge. Balfour discusses pledge in the title immediately after that on caution. The heading is "Anent thingis laid in wad".¹ It will be remembered that the old Scots text of the *Leges Quatuor Burgorum* used *wed* to mean *pledge*.² This has now evolved into *wad*, the root of the terms, as previously instanced, being the Anglo-Saxon, *wed*.³ It is further noticeable that much of Balfour's account uses *Regiam* as its chief source.⁴

Balfour's first point is that both moveables and immoveables may be pledged.⁵ When heritage is to act as security the more precise term, rather than the general *wad*, is *wadset*. This terminology was found in the *Leges Quatuor Burgorum*.⁶ However, Balfour actually uses the terms fairly loosely.⁷ The next point made is important enough to be set out in full :

"ITEM, Efter that it is accordit and agreit betwix the debtour and the creditour, anent the laying of ony thing in wadset, quhat kind of thing that ever it be, movabill or immovabill, the debtour incontinent, efter he hes ressavit the thing borrowit be him, sould put the creditour in possessioun or sasine of the wad."⁸

This passage acknowledges *Regiam Majestatem* III,3 as its source. However, its wording is somewhat original. Gone is the *Regiam* statement that either the property is delivered to the creditor or it is not.⁹ Instead, the property *should* be delivered to him. There is no express statement that the courts will not uphold agreements where there is no delivery, but the implication is very clear. The creditor must receive delivery of the property. There is no security without possession.

Next, there follows a discussion about pledges securing term and on-demand loans, much like that in *Regiam*.¹⁰ It is curious that the creditor's remedy still seems to be

the debtor forfeiting the property to him, particularly after the *Leges Quatuor Burgorum's* much earlier recognition of pledge as a collateral security.¹¹ After this, Balfour looks at the distinct laws affecting pledges of moveables and immoveables respectively.¹² With respect to moveables, his emphasis is on the contractual duties of the pledger and pledgee, such as the latter's duty of care in respect of the pledged property. Indeed the two case decisions which he sets out, involve this aspect of the pledge transaction. Coming from 1566 and 1569, they are the earliest recorded Scottish court decisions discussing pledge.¹³ As regards immoveables the focus is on *deid wad*, in other words mortgage, and the consequences of such usury. The passage, bar the words *deid wad*, could have been lifted straight from Glanvill.¹⁴

Summing up on Balfour, we may note the continuing influence of the Anglo-Norman law and the demand for the creditor to be put in possession. Further, although the law retains its unitary basis, moveable and heritable security are beginning to have distinct personas. This can be seen especially in regard to terminology. The separation of the laws is a product of factual developments such as the case law and the apparent confinement of mortgage to land.¹⁵

1. At page 194.

2. See above, para 29.

3. *Ibid.*

4. See the references at the end of c 1, c 2, c 3, c 4, c 5, c 8 and c 9 (pp 194-196).

5. C 1 : "Of divers kindis of waddis" (p 194). This certainly was the law originally. But, well before Balfour wrote in the sixteenth century, in practice there was no such thing as a simple pledge of land. The wadset, although originally a mere heritable pledge, now involved *dominium* being transferred to the creditor, with the debtor only having a personal right to a reconveyance on discharge of the debt. See above, para 34. Balfour seems to have followed *Regiam* too closely in this area, without looking at what was going on in practice, for which see D M Walker, *A Legal History of Scotland*, vol 2, (1990), pp 683-688.

6. See above, para 29.

7. For example, in c 2 (p 194).

8. C 2 : "The wad sould be deliverit to the creditour".

9. That is, that found in Book 3, chapter 3.

10. C 3 : "Of thingis wadset to a certane day"; c 4 : "Of thingis laid in wad without a certane day."

11. See above, para 27.

12. C 5 : "Of movabill gudis laid in wad"; c 8 : "Of immovabill gudis laid in wad."

13. *Foulis v Cognerlie*, 6 April 1566 (c 6) and *Douglas v Menzeis*, 1 March 1569 (c 7).

14. *Glanvill*, X.8.

15. Although Balfour treats moveable and heritable security as more distinct concepts than *Regiam* does, he underestimates the gulf which existed between them by the time which he wrote. See above, note 5.

Hope's *Major Practicks*

37. **General.** Sir Thomas Hope produced two collections of laws, his *Major Practicks* and his *Minor Practicks*.¹ The first of these, as the name suggests, is the larger work and contains an admittedly brief section on pledge. The latest material found in it may be dated at 1633.²

1. See D M Walker, *The Scottish Jurists*, (1985), pp 93-105.

2. Sir Thomas Hope, *Major Practicks*, (Stair Society vols 3 and 4, 1937-38, ed Lord Clyde). For the date of the work see p xiii of this edition and D M Walker, *op cit*, p 101.

38. **References to pledge.** These are found in title 9 of book 2. The chapter is entitled "De Pignore". Thus, for the first time, the Roman *pignus* is used as the principal term for *pledge* in our law. Gone are *vadium*, *wed* and *wad*. The rationale behind this is surely that Hope was writing amidst the period which saw the "Reception" of Roman law into Scotland.¹ This period would come to fruition in 1681 with Stair's seminal treatise, his *Institutions*.² The key thing we can draw from Hope's work is that the Romanisation of the law of pledge had begun much earlier in the seventeenth century.

In the body of title 9, we find the term *pawne* used.³ This is the first appearance made by it in Scots law too. Further, also seemingly making its Scots law debut is *hypotheca* in the shape of *hypothecam*.⁴ But *wed* is also to be found and significantly, in a subsequent title *pledge* is used to mean caution.⁵

Like Balfour, Hope's emphasis is on the duties of the creditor and debtor. The creditor is obliged to return the property on payment.⁶ If the property is destroyed

without the creditor being negligent, the debtor retains the duty to discharge the debt.⁷ He draws on *Regiam* as an authority.⁸

Hope then deals with two matters relating to hypothecs which need not directly concern us.⁹ There is no suggestion that an express hypothec was permissible at that time; indeed the evidence points the other way.¹⁰ The conclusion to be drawn from Hope's work is that there is a struggle going on between Anglo-Norman law and civil law, at the very least in respect of terminology.

1. See J Dove Wilson, "Reception of Roman Law in Scotland" 1897 JR 361; T Miller, "Reception of Roman Law in Scotland" 1923 JR 362.

2. See below, para 42.

3. At para 1.

4. At para 3. Further in para 4, we find *hypothecatione* and *hypothecation*. The term had been previously used in Latin deeds, for example in the Orkney and Shetland wadsets, but not in any work purporting to state the law in English.

5. Title 11 : "De fidejussoribus". In para 2 we find *plegia* and in para 4, *pledgis*.

6. Para 1.

7. Para 2.

8. See para 1.

9. Paras 3 and 4. Para 3 states that by Act of Parliament (1609 c 11) the Lords of Session have an express hypothec over the king's customs for their salaries. In para 4, we are told of a 1612 case where an exception founded upon a "gift of escheit" defeated an earlier hypothecation.

10. Particularly para 4.

39. Sixteenth and seventeenth century case law. Of the five Scots cases found to deal with pledge from this period, 3 deal with contractual matters and 2 with matters of property law. The earliest, *Foulis v Cognerlie* expresses the rule that if the pledged property is stolen or lost without the creditor being negligent, the debtor is still liable upon the debt.¹ The second, *Douglas v Menzeis* states that the debtor cannot repossess his property until he has discharged the debt.² These are the two cases reported in Balfour's *Practicks* and consequently use *wad* as the term for pledge.

The three later cases, coming during the Reception use the term *impignorare* for the verb *to pledge*. One concerns a contractual right of sale in favour of the creditor, he being liable to restore any surplus to the debtor.³ Scots law at long last appears therefore to have rejected forfeiture as the principal remedy for default upon the secured obligation. The other two cases apply the rule *nemo dat quod non habet* to pledge.⁴ This is uncontroversial.

1. (1566) Balfour 195.

2. (1569) Balfour 196.

3. *Murray of Philiphauch v Cuninghame* (1668) 1 BS 575.

4. *Ramsay v Wilson* (1665) Mor 9113; *Semple v Givan* (1672) Mor 9117.

40. *Jus Feudale*. Published in 1655 but written some forty years earlier, this treatise of Sir Thomas Craig of Riccarton is our earliest institutional work.¹ Written in Latin, it focuses on the feudal land law of the time. It is therefore only of interest to us because we have found evidence of pledge as a unitary concept.²

Craig deals with security over land under the heading "Reversions". He is in reality expositing the law of wadset.³ As has already been seen, Craig was a fierce opponent of giving *Regiam* any place as an authoritative Scots work.⁴ Setting out the law of gage and mortgage found in that work and in Glanvill he regards these as quite distinct institutions from the wadset of lands with its integral debtor's reversionary right.⁵ He states merely that the mortgage "resembles our wadset".⁶ However, Craig is surely deluding himself, for it is very clear that wadset is a developed and refined pledge of immoveable property. Leaving the etymology out, a glance at either the *Leges Quatuor Burgorum* or Balfour exposes the connection.⁷ The refinement is nevertheless an important one, for in wadset unlike pledge ownership of the subject matter of the security is transferred to the creditor.⁸

Craig can be seen to be aware of the development of the English law of mortgage since Glanvill. As we have seen, *mortgage* for Glanvill meant a pledge of land where the rents and profits received by the creditor in possession did not go to reduce the debt : the pledge was thus "dead".⁹ This definition should have caused some concern for the modern lawyer who understands *mortgage* in English law to

mean a transfer of ownership of property to the creditor in security, for example a chattel mortgage or a mortgage of realty under the Law of Property Act 1925. It contrasts with pledge where only possession is transferred.¹⁰

Now as it happens this conundrum may be easily explained. In the fifteenth century, *mortgage* had shed its original meaning and acquired its new one. It became used to define where ownership was transferred to the creditor with the debtor having a reversionary right which was extinguished if he did not discharge his obligation by a certain date.¹¹ At that date, the pledge "dies" and the debtor loses his right to recover his property; *mortgage* was thus an appropriate, though surely confusing, tag for this transaction.¹² Craig was obviously aware that the English law or at least its definitions had thus changed.¹³ However, the new meaning of *mortgage* was never to come into Scots law.¹⁴

The main thing to take from the *Jus Feudale* is the increasing conceptual separation of the law of security with regard to moveables and land. Pledge had become a security confined to moveables. Wadset was the security for land. The declining influence of the Anglo-Norman law may also be noted.

1. Craig, *Jus Feudale*, (trans Lord Clyde, 1934).

2. In particular, in *Regiam*. See paras 21-27 above.

3. *Jus Feudale*, 2.6.

4. See *Jus Feudale*, 2.6.25-26 and para 21 above.

5. *Jus Feudale*, 2.6.27.

6. *Ibid.*

7. Both the *Leges Quatuor Burgorum*, (title 79) and Balfour (pp 194-196 esp c 1 and c 8) treat wadset and the pledging of land as one and the same thing.

8. See, for example, *Erskine*, II.8.4.

9. See above, para 23.

10. *Halsbury*, vol 36, para 103; *Donald v Suckling* (1866) LR 1 QB 585.

11. Sir Thomas Littleton, *Tenures*, (c 1480), s 332; T F T Plucknett, *A Concise History of the Common Law*, (5th ed, 1956), pp 606-608; A W B Simpson, *A History of the Land Law*, (2nd ed, 1986), pp 142-143.

12. *Jus Feudale*, 2.6.27.

13. *Ibid.*

14. Balfour, writing towards the end of the sixteenth century, uses mortgage in the Glanvillian sense : p 196 (c 9). The terminology might never have come into Scots law but the development of heritable security from simple pledge to transfer of *dominium* certainly did. See above, para 30.

(c) From Stair To The Present Day

41. General. The period from 1681 onwards can to all intents be regarded as the modern law.¹ Consequently, it will not be necessary to make a systematic examination of the authorities from this period, for this will come amid the more general analysis in due course. Although some brief comments will be made, this section should be regarded as no more than an overview of the period in question.

1. That is, the period beginning with the publication of Stair's *Institutions*.

42. Stair. Sir James Dalrymple, first Viscount Stair, laid the foundation stone of the modern law with his *Institutions of the Law of Scotland* of 1681.¹ The work owes its civilian structure to Justinian's *Institutes*, being divided into four books.² However, many other authorities influenced Stair, such as the Bible, the various Practicks, the reported case law and the works of foreign jurists.³ Of the last of these, both Grotius and Pufendorf had written upon pledge by 1681.⁴ One authority which Stair made it clear he was not following was *Regiam*.⁵

The main treatment of pledge is given in Book I of the *Institutions* in the section on real contracts, which has a clear Roman basis.⁶ The treatment is not particularly detailed and one thing which springs immediately from the text is the use of the word *pledge* for the first time in our history to mean what we think of as pledge today. Somewhere along the line, this word has changed its definition, from meaning personal security to meaning real security.⁷ The same thing also happened in England.⁸

It is also clear that Stair uses *pledge* only to mean security over moveables and not land. He treats heritable security under the title "Wadsets & c." elsewhere, in Book

II of his work.⁹ However, Stair is clearly aware of the unitary basis of the two forms of security. His introduction to wadsets is but one example of this awareness :

"A wadset, as the word insinuates, being the giving of a wad or pledge in security; it falleth in consideration here as the last of feudal rights : for pledges are the last of real rights, as before in the title Real rights is shown;"¹⁰

Another point to take from this passage is the acknowledgement of pledge as a real right in Scots law. As with the use of the term *pledge*, here too Stair was breaking new ground. Under the heading of *Pledge*, Stair also treats hypothec but this need not concern us in detail here.¹¹

1. See D M Walker, *Introduction* in *Stair, Stair Tercentenary Studies*, (Stair Soc vol 33); Lord Cooper, *The Scottish Legal Tradition*, (2nd ed), pp 67,69; D M Walker, *The Scottish Jurists*, (1985), pp 106-157.

2. See A Campbell, *The Structure of Stair's Institutions*, (1954); Walker, *Introduction*, pp 17-20.

3. See Walker, *Introduction*, pp 20-21.

4. See Grotius, *Inleidinge tot de Hollandsche Rechtsgeleerheid*, (1631, trans R W Lee) III.8; Pufendorf, *De Jure Naturae et Gentium*, (1672). Stair may well have not read Grotius' treatise : see Walker, *Introduction*, pp 20-21.

5. He writes at I.1.16 : "Craig doth very well observe . . . that those books called *Regiam Majestatem* are no part of our law, but were compiled for the customs of England".

6. At I.13.11. For a discussion of the real contracts in Roman law, see B Nicholas, *An Introduction to Roman Law*, (1962), pp 167-171.

7. As we saw above, in para 36, *pledge* formerly meant personal security. Balfour, in reporting *Foulis v Cognerlie* ((1566) Balfour 196) does use the term to mean real security. But otherwise he uses *wad* to mean this and *pledge* to mean caution. See above, para 34.

8. See F Pollock and F W Maitland, *The History of English Law before Edward I*, (2nd ed, 1896, reprint 1968), vol 2, p 185, n 2.

9. *Stair*, II.10.

10. *Stair*, II.10.pr. Another example is found at I.13.14 where he writes that "in wadsets, or impignoratons, that thereby is constitute a real right in the pledge".

11. *Stair*, I.13.14.

43. Erskine and other eighteenth century jurists. Published posthumously in 1773, Erskine's *Institute of the Law of Scotland* is the most important institutional work after Stair. He, however, deals with pledge in Book 3 of his treatise.¹ The structure of his treatise as a whole is different from Stair's, but pledge as in the earlier work is dealt with among the real contracts.² The treatment is relatively brief.³ It is made clear that pledge is a real right and there is evidence of the concept's original unitary nature.⁴

A near contemporary of Erskine was Lord Bankton. His *Institute* was published in 1751 and his treatment of pledge is not unlike that of Stair and Erskine.⁵ Slightly longer, he gives some useful detail. Generally, the great value of Bankton's work lies in his comparative analysis of the contemporary English law rules.⁶

Another eighteenth century scholar with something to say about pledge was the economist Adam Smith. His *Lectures on Jurisprudence* contain some useful material.⁷ In particular, he was very unhappy about the effect of licensing pawnbrokers.⁸

1. At III.1.33.

2. For a discussion of Erskine's structure, see W W McBryde's introduction to Erskine, *Institute of the Law of Scotland*, (8th ed, ed Nicholson, 1989 reprint).

3. Merely to be found at III.1.33.

4. At III.1.33 he describes "a right of wadset" as "an heritable pledge".

5. *Bankton*, I.17.

6. His study of the English rules on pledge may be found at the end of title I.17.

7. Adam Smith, *Lectures on Jurisprudence*, (1978, ed R L Meek, D D Raphael and P G Stein), pp 78-81 and 471.

8. See below, para 45.

44. Eighteenth century case law. There is very little to say on this matter, as the number of pledge cases in this period was very small.¹ None of these contain any significant judicial wisdom on the subject. This contrasts sharply with England, where early on in the century Chief Justice Holt gave an exposition of the relevant

law in the famous case of *Coggs v Bernard*.² His judgement remains influential to this day.³

1. But see *Pringle v Gribton* (1710) Mor 9123; *Mitchell v Burnet and Mouat* (1746) Mor 4468 and *Hariot v Cuninghame* (1791) Mor 12405.

2. (1703) 2 Ld Raym 909; 92 ER 107.

3. See N E Palmer, *Bailment*, (2nd ed, 1991), chapter 22.

45. The development of pawnbroking. The professional pledge-taker or pawnbroker has been a feature of society, here and abroad, since medieval times.¹ In Scotland, for example, we had the wad-wife. She, however, tended to be more of a general moneylender and businesswoman.² In Britain the standard rates of interest fixed by the Usury Acts were not high enough to cover the cost of small loans for brief periods of time.³ Specialised pawnbrokers were few and far between.

The coming of industrialisation brought with it an increased demand for credit. Legislation was therefore enacted in the eighteenth century to allow such businessmen to charge higher rates of interest fixed by Parliament.³ Despite the fixing of interest rates, the borrower risked exploitation by the broker. Many of the borrowers were poverty-stricken and in no position to negotiate.⁴ One of the main types of exploitation was providing for forfeiture on non-payment. It led Adam Smith to lambast the licensing of pawnbrokers as "one of the great nuisances in the English constitution, especially in great cities."⁵

The need for further legislation was seen, and this came, with the whole area eventually being consolidated upon the passing of the Pawnbrokers Act 1800 (c 99). This statute appears to have triggered the development of pawnbroking elsewhere in the United Kingdom. It was at first not clear that the 1800 Act applied north of the border.⁶ Local acts also regulated the business.⁷ Attempts to evade the legislation led to Parliament intervening again and detailed work by the House of Commons Select Committee on Pawnbroking came to fruition with a new consolidation statute, the Pawnbrokers Act 1872 (c 93).⁸

The main features of the pawnbroking legislation require the broker to have a licence, require him to issue a receipt to the borrower, prohibit pawn taking from those of nonage, regulate the redemption procedure and regulate the procedure for realisation of the pawn if there is default. Where there is no specific statutory provision, the common law applies.⁹

Whilst pawnbroking in Britain is subject to detailed state regulation, it remains essentially a matter of private enterprise. The continental system of "Montes Pietatis" or government pawnshops has never been introduced here.¹⁰

1. See J K Macleod, "Pawnbroking : A Regulatory Issue" 1995 JBL 155, 159f. Thus the plot of Fyodor Dostoyevsky's *Crime and Punishment*, (1866), involves the murder of an elderly woman pawnbroker.

2. See above, para 33.

3. See *Macleod*, at 160.

4. For, as Bell (*Principles* s 209) writes, "Pawnbroking is one species of pledge, affording a resource to poverty".

5. Adam Smith, *Lectures on Jurisprudence*, (1978 ed, ed R L Meek, D D Raphael and P G Stein), p 80.

6. *Macleod*, at 161.

7. Such as the Glasgow Police Acts; see *Macleod*, *ibid*.

8. For the committee's report, see *House of Commons Parliamentary Papers*, 1870, vol VIII, para 391 *et seq*. See now the Consumer Credit Act 1974 (c 39), ss 116-121.

9. See Bell, *Principles*, s 209. The same principles are found in the present legislation, the Consumer Credit Act 1974 (c 39).

10. See Bell, *Commentaries*, II,20; Bell, *Principles*, s 208 and the Spanish Civil Code, article 1873.

46. Bell and other nineteenth century jurists. George Joseph Bell's treatment of pledge in his *Commentaries on the Law of Scotland and on the Principles of Mercantile Jurisprudence* and *Principles of the Law of Scotland* is more detailed than anything before. In the *Commentaries* he analyses it as part of his section on real security.¹ In his *Principles* he gives equal coverage to it as a contract and later on as a real right in security.²

David Hume, Bell's predecessor as Professor of Scots Law in the University of Edinburgh, deals with pledge under the heading "Pledge and Hypothec" in his *Lectures* which were eventually published a century after his death.³ Notwithstanding the late publication, Hume's work was influential much earlier, with judges referring to their personal lecture notes.⁴ Thus in an important nineteenth century pledge case, Lord Benholme says :

"I cannot refrain from reading a passage [upon pledge] from a copy of Baron Hume's lectures in my possession, the accuracy of which I have tested by several comparisons, and particularly by comparing it with an extract from the notes taken in the class by my brother Lord Cowan."⁵

Hume's *Lectures*, by this time published, were the decisive authority used by the Second Division in the most recent Scots pledge case.⁶

W M Gloag and J M Irvine are the final Scottish jurists to merit particular mention here. Their *Law of Rights in Security*, published in 1897, is the first and remains the only monograph devoted to the subject. The book remains influential today.⁷ It includes a detailed discourse on pledge.⁸

It would be inappropriate to conclude this section without mentioning the American legal writer, Joseph Story. His *Commentaries on the Law of Bailments* contains a very erudite and comprehensive account of the civil and common law on pledge. It has proved to be a highly influential work.⁹

1. Bell, *Commentaries*, II, 19-24.

2. Bell, *Principles*, ss 203-209 and 1362-1367.

3. See D M Walker, *The Scottish Jurists*, (1985), pp 316-336.

4. See, for example *Biggart v City of Glasgow Bank* (1879) 6 R 470, 475-476 per Lord Deas.

5. *Christie v Ruxton* (1862) 24 D 1182, 1186. See also, Lord Cowan, *ibid*.

6. *Wolifson v Harrison* 1977 SC 384.

7. See, for example *Armour v Thyssen Edelstahlwerke AG* 1990 SLT 891, 894 per Lord Keith (HL).

8. At pp 199-219.

9. J Story, *Commentaries on the Law of Bailments*, (1829). Bell makes reference to it in his *Principles*, for example (4th ed, 1839), s 203. Story is cited by the Sheriff in *Kirkwood and Pattison v Brown* (1877) 1 Guth Sh Cas 395. The work clearly influenced the decision of the English court in the important case of *Donald v Suckling* LR 1 QB 585.

47. Nineteenth century case law. After a slow start, this period sees the great mass of case law which, along with the institutional writings, amounts to the common law of pledge. The latter fifty years stretching into the first decade of the twentieth century contains all the leading cases in this area.¹ For the first time we have reasonably detailed judicial opinions on matters such as what may be pledged and what quality of delivery is required.² In particular there is much discussion on the pledge of documents of title.³

The profusion of case law reflects the fact that this period was commercially very significant.⁴ Queen Victoria ruled much of the globe and there was much trade with the many parts of the Empire. Important commercial statutes were being passed. The Mercantile Law Amendment Act Scotland 1856 (c 60), the Factors Act 1889 (c 45) and the Sale of Goods Act 1893 (c 71) all resulted in case law relating to rights in security in general and pledge in particular.⁵

1. Cases such as *Hamilton v Western Bank of Scotland* (1856) 19 D 152; *Moore v Gledden* (1869) 7 M 1016; *Tod and Son v Merchant Banking Co* (1883) 10 R 1009; *North Western Bank v Poynter, Son and Macdonalds* (1894) 22 R (HL) 1 and *Hayman v McLintock* 1907 SC 936.

2. On the first of these matters see *Christie v Ruxton* (1862) 24 D 1182; *Liquidator of Garpel v Andrew* (1866) 4 M 617 and *Robertson v British Linen Co* (1890) 18 R 1225. On the second, see *Hamilton*, above; *Mackinnon v Max Nanson* (1868) 6 M 974 and *Connon v Lindsay and Oakeley* (1869) 6 SLR 552.

3. See *Gloag and Irvine*, chapter 8.

4. See Lord Rodger of Earlsferry, "The Codification of Commercial Law in Victorian Britain", (1992) 108 LQR 570. However, pledges of small valuable items went on as they had for centuries : see, for example, Sir Arthur Conan Doyle, "The Beryl Coronet" in *Sherlock Holmes : The Complete Illustrated Short Stories*, (Chancellor Press, 1985), p 192.

5. The Factors Act 1889 was extended to Scotland by the Factors (Scotland) Act 1890 (c 40).

48. The twentieth century. This has seen little development in the law relating to pledge. A number of textbooks on the general law and on commercial law have

given an account of the subject.¹ It would be fair to say that the same information has often been given.²

In terms of the case law, the first twenty years of the century saw a batch of Sheriff Court cases dealing with pawnbroking.³ After that time there appears only to be one further Scots case with turns on a substantive question of the law of pledge.⁴ The main legislative development has been the replacement of the Pawnbrokers Act 1872 by provisions of the Consumer Credit Act 1974 (c 39).⁵ Recent concern has been expressed that these provisions regulating pawnbroking are too open to evasion.⁶

Away from pledge, this century has seen important statutory reforms to the law of real security in general.⁷

1. See *Shaw*, pp 10-22; W M Gloag, *Encyclopaedia*, vol 11 (1931), sv "Pledge", paras 753-778; T B Smith, *A Short Commentary on the Law of Scotland*, (1962), pp 472-475; J J Gow, *Mercantile and Industrial Law of Scotland*, (1964), pp 272-275; J Lillie, *The Mercantile Law of Scotland*, (6th ed, 1970), pp 88-91; D M Walker, *Principles of Scottish Private Law*, (4th ed, 1989), vol 3, pp 394-398; 5; W A Wilson, *The Scottish Law of Debt*, (2nd ed, 1991), pp 90-93; W Wallace and A McNeil, *Banking Law*, (10th ed, ed Caskie, 1991), pp 163-166; A J Sim, *SME*, vol 20, (1992), paras 14-25; E A Marshall, *Scots Mercantile Law*, (2nd ed, 1992), pp 462-467; W M Gloag and R C Henderson, *The Law of Scotland*, (10th ed, 1995), paras 19.10-19.13; L D Crerar, *The Law of Banking in Scotland*, (1997), pp 269-282.

2. In particular there has been an emphasis upon actual, constructive and symbolical delivery. See particularly, *Gloag and Henderson*, *Walker and Marshall*, *op cit*.

3. *Singer Mfg Co v Martin* (1904) 20 Sh Ct Rep 125; *Niven v McArthur's Trs* (1907) 23 Sh Ct Rep 299; *McMillan v Conrad* (1914) 30 Sh Ct Rep 275; *Singer Sewing Machine Co v Quigley* (1914) 30 Sh Ct Rep 56; *Elliot v Conway* (1915) 31 Sh Ct Rep 79; *McPhater v Smith Premier Typewriter Co* (1917) 33 Sh Ct Rep 301; *McKellar v Greenock and Port Glasgow Loan Co* (1918) 34 Sh Ct Rep 93 and *Hislop v Anderson* (1919) 35 Sh Ct Rep 116.

4. *Wolifson v Harrison* 1977 SC 384.

5. Consumer Credit Act 1974 (c 39), ss 116-121.

6. J K Macleod, "Pawnbroking : A Regulatory Issue" (1995) 24 JBL 155.

7. The law of heritable security was overhauled by the Conveyancing and Feudal Reform (Scotland) Act 1970 (c 35) which introduced the standard security, the only competent method of now creating a heritable security. See D J Cusine, *Standard Securities*, (1991). Agricultural credits were introduced by the Agricultural Credits (Scotland) Act 1929 (c 13). Floating charges were introduced by the Companies (Floating Charges) (Scotland) Act 1961 (c 46). Receivership was introduced by the Companies (Floating Charges and Receivers) (Scotland) Act 1972 (c 67). The present legislation

is the Companies Act 1985 (c 6) and the Insolvency Act 1986 (c 65).

3. THE ECONOMICS OF PLEDGE

49. General. The economic value of pledge was appreciated by Justinian :

"Pledge benefits both parties, the debtor because it helps him get credit, and the creditor because it helps him give credit safely."¹

The basic principle remains the same today. A potential lender will be far more willing to give credit if in return he is given a nexus over an asset of the debtor's.² Secured loans attract a lower interest rate than unsecured loans, for the creditor has a lesser risk. If the debtor does default the creditor can go about realising his security. The facilitation of the provision of credit by securities allows capital to be obtained by would-be businessmen who go on to benefit our national economy.³ Further, in the non-commercial sphere pledge has been seen as a mechanism to alleviate the poverty of individuals.⁴

1. Justinian's *Institutes*, 3.14.4. (*Quia pignus utriusque gratia datur, et debitoris, quo magis ei pecunia crederetur, et creditoris, quo magis ei in tuto sit creditum.*)

2. See Shaw, pp 1-2; Eighth Report of the Law Reform Committee of Scotland, *The Constitution of Security over Moveable Property; and Floating Charges*, (1960), (Cmnd 1017) and M Bridge, "The Quistclose Trust in a World of Secured Transactions", (1992) 12 OJLS 333, at 336-339. Not everybody agrees with the conventional view : see G L Gretton, *Remarks on the DTI Paper of November 1994 on Security over Moveable Property in Scotland* (Edinburgh University Seminar Paper, 23 February 1995).

3. Shaw, *ibid*.

4. Bell, *Principles*, s 209.

50. The value of pledge versus other securities. It has already been noted that the number of pledge decisions this century has been small.¹ The reason for this is that pledge is rarely in use to secure large commercial loans. The problem with pledge is that the debtor must deliver his asset or assets to the creditor. To fund a large loan he will have to deliver a valuable amount in assets. Obviously it is very difficult to run a business if your creditor has physical detention of your most valuable assets.² And if you are unable to run your business you will be unable to pay back the loan.

This, as we saw, was why Roman law introduced *hypotheca* for agricultural tenants requiring credit, whose only valuable assets were their implements.³

Whilst the Scottish courts have made some concessions to the needs of commerce, such as allowing securities to be created over documents of title, the overriding principle remains unchanged. There is no security over moveable property in Scots common law without possession.⁴ The approach has been criticised but the courts remain intransigent.⁵

Unsurprisingly, the need for security with possession in the debtor has led to statutory reform. Floating charges were introduced for the use of companies in 1961 and although their regulating legislation is considered to have been badly drafted, they fulfil a clear commercial need.⁶ They are not as alien to Scots law as has been suggested, for as Sir Thomas Smith pointed out, security *retenta possessione* is consistent with the civilian foundation of modern Scots law.⁷ The introduction of receivership in 1972 without regard to the differences in English and Scots private law is more difficult to justify.⁸ However, the practical point is that floating charges are used to secure large commercial loans and if there is default the company will go into receivership.

In a recent consultation paper, the Department of Trade and Industry proposes an extension to the current law in respect of non-possessory security.⁹ It wishes to see all businesses being able to create floating charges over their property.¹⁰ Further, it proposes the introduction of a new registered hypothec over moveables, to be known as the "moveable security".¹¹ The consultation paper does not make any alterations to the existing common law securities.¹² Its proposals are controversial, but it continues an established trend which has seen pledge, documents of title apart, being confined to the pawnbroker's shop.

1. See above, para 52.

2. The whisky industry, however, has been able to make use of pledge through the system of bonded warehousing.

3. See above, para 16.

4. See *Gloag and Irvine*, pp 187-191; A J Sim, *SME*, vol 20, para 8.



5. For discussion, see *Gloag and Irvine*, pp 187-188; G L Gretton, "Security over Moveables Without Loss of Possession", 1978 SLT (News) 107 and D O'Donnell and D L Carey Miller, "Security over Moveables : A Longstanding Reform Agenda in Scots Law", (1997) 5 *Zeitschrift für Europäisches Privatrecht* 807, at 808-809. The courts have on occasion gone too far : see *Emerald Stainless Steel Ltd v South Side Distribution Ltd* 1982 SC 1 (OH), overruled by *Armour v Thyssen Edelstahlwerke AG* 1990 SLT 891 (HL).

6. Professor Gretton is sceptical about the commercial need : see his "What Went Wrong With Floating Charges?" 1986 SLT (News) 325. But compare R B Jack, "The Coming of the Floating Charge to Scotland" in D J Cusine (ed), *A Scots Conveyancing Miscellany* (1987) and look at the number of bodies which wished to see the introduction of the floating charge : Eighth Report of the Law Reform Committee for Scotland (Cmnd 1017, 1960) pp 1-3.

7. On the 'alien' nature of the floating charge, see Gretton, *ibid*. Sir Thomas makes his point in his *Short Commentary* at p 474 and in Appendix 1 to the Eighth Report, *ibid*.

8. See, for example, Lord President Hope's invective in the last page of his judgement in *Sharp v Thomson* 1995 SLT 837, 854-855. Cf the House of Lords judgement : 1997 SLT 636.

9. Department of Trade and Industry Consultation Paper, *Security over Moveable Property in Scotland*, November 1994. Discussed by J Murray, "Reform of Security over Moveable Property", 1995 SLT (News) 31, H Patrick, "Reform of Security over Moveable Property : Some General Comments", 1995 SLT (News) 42; A J M Steven, "Reform of Security over Moveable Property : Some Further Thoughts", 1995 SLT (News) 120 and D O'Donnell and D L Carey Miller, "Security over Moveables : A Longstanding Reform Agenda in Scots Law", (1997) 5 *Zeitschrift für Europäisches Privatrecht* 807.

10. Consultation paper, para 2.10.

11. Consultation paper, para 2.11.

12. Consultation paper, para 2.9.

4. THE OBLIGATION SECURED

51. A valid obligation. As a right in security, pledge is parasitic upon the obligation which it secures.¹ Consequently, the validity of the pledge is dependent on the validity of the underlying obligation. Any valid *causa* may be secured, be it a monetary debt or an obligation *ad factum praestandum*.² The law is the same in other jurisdictions and has been clear for some time.³ Thus in Genesis, a pledge secured the delivery of a young goat.⁴ The question as to what extent a pledge can secure a contingent debt is an open one. As a general rule, it is suggested that if a debt is too contingent to be assigned, then it is too contingent to be secured by a pledge.⁵

1. See G L Gretton, "The Concept of Security" in D J Cusine (ed), *A Scots Conveyancing Miscellany* (1987) 126, 128. As F Lent, *Sachenrecht : Ein Studienbuch*, (14th ed, by K H Schwab, 1974), p 261, puts it : "*Das Pfandrecht . . . ist streng akzessorisch*". See also the Civil Code of Louisiana, art 3138. See the BGB, art 1252.

2. Bell, *Principles* s 203. In the vast bulk of cases the pledge secures a debt. Indeed this is why many writers (eg Erskine III.1.33) do not mention any other form of obligation. However, it is clear that a non-monetary obligation may be secured : *Moore v Gledden* (1869) 7 M 1016.

3. See the valuable discussion by Joseph Story : *Commentaries on the Law of Bailments*, (1839), s 286. See also the Civil Code of Louisiana, arts 3136 and 3140 and R Slovenko, "Of Pledge", (1958) 33 Tul LR 59, at p 65; the Spanish Civil Code, art 1861; the Civil Code of Quebec, arts 2660 and 2687; and the BGB, art 1204.

4. Genesis 38.17-18.

5. See G L Gretton, "The Assignment of Contingent Rights" 1993 JR 23.

52. Extent to which the obligation is secured. Unless there is express agreement to the contrary, the entire obligation will be secured.¹ Thus, where it is a monetary debt, in the words of Bell :

"Pledge operates as a security for the whole debt, and is not weakened by payment of a part of the debt, but remains as complete for the last shilling as for the whole."²

This will obviously include interest due upon the debt.³ The statutory rules on pawnbroking do not alter the basic rule.⁴

1. A J Sim, *SME*, vol 20, para 16; L D Crerar, *The Law of Banking in Scotland*, (1997), p 270.

2. Bell, *Principles*, s 1365. See also J Story, *Bailments*, s 301 and the Spanish Civil Code, art 1860.

3. D L Carey Miller, *Corporeal Moveables in Scots Law*, (1991), p 245 n 12. The law is the same in Germany : BGB, art 1210 and South Africa : G Lubbe, *LAWSA*, vol 17, para 478.

4. *McMillan v Conrad* (1914) 30 Sh Ct Rep 275.

53. Effect of assignation of the creditor's right. There is a dearth of authority here. Our law would seem to recognise the following basic principle, as enunciated by Erskine :

"Assignations, when properly perfected, carry to the assignee all rights which corroborate or strengthen the right conveyed".¹

Thus, where a debt is secured by a bond of caution, the cautioner remains liable where the debt is assigned.² The general principle may be referred to by the maxim *accessorium sequitur principale*.³ Now, be this as it may as a principle of our law, it is not easy to reconcile with certain principles of the law of pledge. As a preliminary point, where the pledged property is of a special character, for example, a valuable painting, the pledger will not wish to see it leave the pledgee's hands. In this situation the right of pledge cannot be assigned.⁴

More generally, pledge depends on the pledgee being in possession.⁵ However, the application of the *accessorium sequitur principale* here would mean that a party to whom a debt secured by a pledge is assigned, automatically and immediately becomes pledgee, although he is not necessarily put in possession of the impignorated property. It is inconceivable that the principle requiring a pledgee to be in possession does not take priority here. Erskine himself can be cited to prove this. Speaking about the remedies a pledgee has if the pledger defaults upon the secured obligation, he says :

"Some creditors have attempted to make a pledge effectual for their payment by assigning the debt to a trustee; who, upon that conveyance may arrest the pledge in the hands of his cedent, the original creditor, and then pursue a forthcoming against him. But in this way the original creditor may, by a prior arrestment of the pledge used by another creditor, lose his right of impignoration; which, from the nature of all real contracts, cannot subsist but where he who is in the right of the debt is also in the possession of the pledge."⁶

Thus the maxim *accessorium sequitur principale* is overridden by the general rules of pledge. That the assignee must be put in possession is made clear by Professor Reid.⁷ However, Erskine's statement seems to deny that even putting the assignee in possession will give him the right of pledge. For what he is saying is that when the pledgee assigns the debt his right of pledge is extinguished. Once a right is extinguished it is gone. Simply transferring possession of the formerly impignorated

property is not going to revive it. The only way to make the assignee himself pledgee is to get the co-operation of the owner of the property, that is the pledger. The assignee will only validly obtain the right of pledge, if the pledger is willing to recognise him as pledgee.

Another point in favour of this conclusion is the fact that the assignation of a pledge does not merely involve the assignation of a real right. It involves the assignation of obligations, such as to exercise ordinary care in respect of the property and, importantly, to restore the property upon payment of the secured debt.⁸ Obligations in general cannot be assigned, unless the person to whom the obligation is owed agrees.⁹ A useful comparison may be made with the law of leases, lease being another subordinate real right. Bar a couple of exceptions which the common law has developed, a lease may not be assigned without the landlord's consent.¹⁰ Of course, it is possible to give the tenant express power to assign in the lease.

There is an old Scottish case in which the court seemed to recognise an assignee as a pledgee where possession had been transferred to him.¹¹ The case conflicts with the conclusion newly reached, in that the co-operation of the pledger does not seem to have been sought. However, the matter was not discussed, the main point of the case being something different.¹² Certainly, our conclusion is in accordance with South African law.¹³ Under it, a cession (assignation) of a pledge without the pledger's consent results in the pledgee's real right being terminated.¹⁴ On one view this is because the pledgee's action is regarded as an express or tacit renouncement of his real right.¹⁵ The better view, according with Erskine, is that the pledge is extinguished because the secured obligation no longer exists between the pledger and the pledgee but between the pledger and the pledgee's cessionary (assignee).¹⁶

By way of contrast, English law allows the assignment (assignation) of a pledge without the pledger's consent. This is because it is regarded as an assignment of the "interest" or "special property" which the English pledgee has in the pledged property.¹⁷ English law regards such an "interest" to be disposable.¹⁸ Under German law, the assignation of the secured debt causes the right of pledge to be assigned too, unless the parties agree otherwise.¹⁹

1. *Erskine*, III.5.8.

2. *Lyell v Christie* (1823) 2 S 288.

3. See W Bell, *Dictionary*, (7th ed, 1890), sv "*Accessorium sequitur principale*". See also *Comments By Scottish Law Commission on Consultation Paper by DTI on Security over Moveable Property in Scotland (November 1994)*, (March 1995), p 43.

4. See discussion on this with regard to a pledge by a pledgee, below para 78. Note A J Sim, *SME*, vol 20, para 25.

5. Bell, *Principles*, s 1464. See below, para 102.

6. *Erskine*, III.1.33.

7. K G C Reid, *SME*, vol 18, para 657.

8. See below, paras 96 and 100.

9. K G C Reid, *SME*, vol 18, para 662.

10. See J Rankine, *Law of Leases in Scotland*, (3rd ed, 1916), p 173.

11. *Ramsay v Wilson* (1666) Mor 9113.

12. The claim of the assignee against a subsequent pledgee of the property. The property had been unlawfully removed from the assignee and pledged to the latter who was in good faith. The court held that the pledgee had no right to retain the goods, his pledger having no title to pledge.

13. See *Oertel NO v Brink* 1972 (3) SA 669, 675 per Boshoff J : "A pledgee has no right to cede pledged property to another without the owner's consent". See also *Deutschmann v Mpeti* 1917 CPD 79 and H S Silberberg and J Schoeman, *The Law of Property*, (3rd ed, 1992), p 474.

14. *Wille's Law of Mortgage and Pledge in South Africa*, (3rd ed, ed Scott and Scott, 1987), p 146.

15. *Ibid*; G Lubbe, *LAWSA*, vol 17, para 502.

16. *Wille*, *op cit*, n 14.

17. *Donald v Suckling* (1866) LR 1 QB 585; *Halliday v Holgate* (1868) LR 3 Ex 299; *A P Bell*, p 146; *Halsbury*, vol 36, para 125.

18. *Ibid*.

19. BGB, arts 1250-1251.

5. RETENTION FOR OTHER DEBTS

54. General. A vexed question is whether the creditor can detain the subject matter of the pledge for debts other than those which the pledge was contracted to secure.

What is the position, for example, if the creditor makes the debtor some further advances ? Indeed, it is not clear even if the creditor expressly provides that the pledge is to secure "all sums" due to him by the debtor whether such an agreement will be upheld. Now, of course as a matter of contract such an agreement would be valid.¹ The problem is if there are third parties involved, such as other creditors of the debtor executing diligence or - if the debtor becomes insolvent - a trustee in sequestration.

1. On the basis of freedom of contract.

55. Bell's approach. It was not until the fourth edition of his *Principles* that Bell plucked up the courage to tackle the matter and even then he seems to have been nervous as he by mistake introduces it as "where additional advances have been made to the creditor".¹ He of course meant to say *debtor*. Bell's first statement is that when an item of property is transferred by the debtor to the creditor *ex facie* absolutely but truly in security, the debtor has no right to demand a reconveyance until he has discharged his entire debt due to the creditor. Future advances are encompassed by this. To provide authority for this, Bell refers to the heritable security by absolute disposition with an unrecorded back-bond, the mortgage of a ship and the assignation of a debt.² The specialised example of the ship apart, none of these cases involve a corporeal moveable. However, Bell attempts to provide an all-embracing rationale for the rule applicable to all forms of property when he writes that in these situations the creditor has "a right ostensibly universal and absolute" rather than an express security.³

Bell's second statement is that where a moveable has been given in pledge without limitation of security, the fact that the creditor has possession suggests that any further advances are made because of that possession. Therefore any further advances are secured. However, if the pledge is expressly limited to a specific advance at the time of constitution, as against third parties it is limited to this advance. Bell cites only English authority to support this.⁴ Thirdly, he states that the security may be expressly extended to cover further advances. However such an agreement is only good if made before third parties take any action against the creditor.⁵

1. Bell, *Principles*, s 1367. Sheriff Guthrie corrected the mistake when he edited the 6th edition, 1872. Bell briefly considered the subject in his *Commentaries* (II,22) However proper analysis was lacking : see Lord Handyside in *Hamilton v Western Bank* (1856) 19 D 152, 156.

2. The heritage case was *Pringle's Creditors, sub nom Brough's Crs v Jollie* (1793) Mor 2585; the ship case, *Balleny v Raeburn and Co* June 7, 1808 FC and the debt case was *Dougal's Crs* 1794 Bell's Ca 41.

3. Bell, *Principles*, s 1367.

4. *Demaimbry v Metcalf* (1715) Prec in Ch 412; 1 Bell's Illustrations 441.

5. *Op cit*, n 3.

56. Subsequent authority. Since Bell's death there has been some case law development. There is the important judgement of the Lord Ordinary (Handyside) in *Hamilton v Western Bank of Scotland*,¹ which begins by stating that apart from Bell there is little authority on the matter.² The factual situation involved was that some warehoused brandy had been made the subject of a security by the owner indorsing the delivery order to his bank, with intimation to the warehousekeeper. This was done to secure the discount of some bills. The bank then made a further advance. Lord Handyside viewed the transaction as pledge. He accepted Bell's opinion that a pledge originally specific to its subject may not be tacitly extended to cover other debts due. However, he reserved judgement on the validity of Bell's comments with regard to third parties.³ In the Inner House, his judgement was reversed on the basis that the transaction was not pledge but absolute transfer in security.⁴ However, in an *obiter* part of his judgement Lord Deas states that he would have concurred with Lord Handyside had he regarded the matter as one of pledge.⁵

In *Rintoul and Co v Bannatyne*⁶ goods had been pledged in security of a specific advance. This advance was repaid. However, the creditor attempted to retain the goods in security of a prior claim. Upon a petition he was ordered by the sheriff to return the goods. Although the creditor then tried some blocking tactics which became the main focus of the action, he does not seem to have disputed the general principle that a pledge cannot be tacitly extended to cover other debts.

In *Alston's Tr v Royal Bank of Scotland*⁷ the Lord Ordinary (Low) seems happy to accept Lord Handyside's opinion of the law as expressed in *Hamilton*.⁸ That case involved the deposit in security of negotiable instruments with a bank. In the

reclaiming motion the bank argued that the deposit was an *ex facie* absolute transfer in security so that it therefore could retain the instruments against all debts. The depositor, conversely, argued it was a pledge and consequently that the bank could not retain for a general balance. Hence, on this point of law, although not the interpretation of the facts, both sides agreed with the Lord Ordinary. In the Inner House it was held that the securities were pledged in security "as against any sum which might be due . . . on [the] current or cash account . . . [and] deposited not as against any specific debt or obligation".⁹ Thus the court seemed happy with the notion of an "all sums" pledge. Of course, here no third parties were involved.

Since Bell, other writers have attempted to treat the subject. Gloag and Irvine examine the case law, as we have just done, with the same conclusions.¹⁰ Indeed, given that there has been no relevant case law since their time of writing, their statement that it "seems never to have been settled" whether a pledge can be tacitly extended, remains true today.¹¹ Graham Stewart states the property pledged is security only for the specific advance made. However it may be shown that by agreement it was extended to cover other debts or further advances. But he adds that if prior to the agreement to extend an arrestment is used by another creditor of the pledger, then the arrester will be preferred as against the debt which the pledge has been extended to cover.¹²

More recent writers have also touched upon the subject. According to Professor Walker, a pledge will be good security for advances made subsequently to the original pledging.¹³ However, he cites *Hamilton* as his principal authority, where the transaction was held not to be one of pledge. Thus Professor Walker is misleading. Professor Wilson states that the subject cannot be retained for payment of debts other than the one for which it was pledged.¹⁴ However, Professor Crerar takes a view similar to that of Graham Stewart.¹⁵

1. (1856) 19 D 152, 155-158.

2. At 156.

3. At 157.

4. (1856) 19 D 152, 158-167.

5. At 165.

6. (1862) 1 M 137.

7. (1893) 20 R 887.

8. At 890.

9. Per Lord Trayner at 894.

10. *Gloag and Irvine*, pp 213-214.

11. *Ibid*, p 213.

12. J Graham Stewart, *The Law of Diligence*, (1898), p 172. Like Bell, he uses an incorporeal property case (*Clyde v Dunnet* (1833) 11 S 791 affd McL and Rob 28) and a heritable property (*Union Bank v National Bank* (1885) 13 R 380 rev 14 R (HL) 1) security case to help to justify his conclusions.

13. D M Walker, *Principles of Scottish Private Law*, vol 3, (4th ed, 1989), p 396.

14. W A Wilson, *The Scottish Law of Debt*, (2nd ed, 1991), p 92. See also A J Sim, *SME*, vol 20, para 16. Cf D L Carey Miller, *Corporeal Moveables in Scots Law*, (1991), para 11.12..

15. L D Crerar, *The Law of Banking in Scotland*, (1997), p 270.

57. Comparisons with other securities. Before trying to draw these various strands of authority together, it will be useful to examine the rules which govern this situation with respect to other forms of property. Bell himself took this approach.¹ With regard to security over incorporeal property the law appears settled. An *ex facie* absolute assignation will secure all debts owed by debtor to creditor, unless the parties have agreed otherwise.² On the other hand, an assignation expressly in security will only secure the original debt for which it was assigned to secure.³

Now it would be very easy to draw a direct comparison between pledge and an assignation expressly in security and then one between an *ex facie* absolute assignation of an incorporeal moveable and an *ex facie* absolute transfer of a corporeal moveable. In the latter case the comparison is valid.⁴ The fact that there is a body of legal thought which regards an assignation expressly in security as simply a pledge of debt makes the first comparison attractive also.⁵ However, on closer analysis this would seem misguided. For the correct comparison with an assignation expressly in security of an incorporeal moveable is with a transfer expressly in security of a corporeal moveable and not with pledge.⁶

With respect to land, pre 1970 the *ex facie* absolute disposition in security was good for "all sums".⁷ However, the bond and disposition in security was not.⁸ But the rule in the second case came not from common law, but from the Bankruptcy Act of 1696 (c 5).⁹ This Act affected the wadset, the direct ancestor of the bond and disposition of security.¹⁰ And of course, as has been shown, the wadset was a development from pledge.¹¹ The suggestion therefore is that at common law, an "all sums" pledge is valid, but only if expressly provided for.

1. See above, para 55.

2. *Hamilton v Western Bank* (1856) 19 D 152; *National Bank v Forbes* (1858) 21 D 79; *National Bank v Dickie's Trs* (1895) 22 R 740.

3. *Ibid.*

4. Both involve transfer of title to property.

5. Particularly in South African law : see S Scott, *The Law of Cession*, (2nd ed, 1991), chapter 12.

6. On which, see J Graham Stewart, *The Law of Diligence*, pp 157-158. Therefore it is not the best idea to directly equate them as does E A Marshall in *Scots Mercantile Law*, (2nd ed, 1992), para 7-111.

7. See *Gloag and Irvine*, p 142.

8. *Ibid.*

9. See *Erskine*, II.8.36; Bell, *Principles*, s 911.

10. Very little research has been done on the wadset, but see G L Gretton, *SME*, vol 18, para 112.

11. See above, paras 35 and 40.

58. Conclusion. The relevant law may be tentatively summarised :

1. If a pledge is expressly stated to be specific to a certain debt, then there may be no retention for any other debt. On this the authorities agree.¹

2. Where a pledge is originally specific to a particular debt but both parties later agree that it will cover another debt or other debts, this arrangement will be upheld.² This agreement may be express or implied but obviously it is best to have something in writing.³ However, if there has been an arrestment executed or some other third

party intervention prior to this new agreement, the creditor will only be preferred to the extent of the original debt.⁴

3. An "all sums" pledge is valid.⁵ However, it is suggested in this situation that if a third party creditor of the pledger gives notice to the pledgee that he has made an advance to the pledger, then he should be preferred in the event of the pledger's insolvency as against any later contracted advances made by the pledgee. In short the equitable rule which applied at common law and is now provided for by statute in respect of heritable security should be applied to pledge.⁶

1. See Bell, *Principles*, s 1367; *Graham Stewart*, p 172; A J Sim, *SME*, vol 20, para 16 and Lord Handyside's judgement in *Hamilton*.

2. Bell, *ibid*; *Graham Stewart*, p 172; *Carey Miller*, p 245; cf *Wilson*, p 92 and *Sim*, *ibid*.

3. It is risky to rely upon Bell's presumption based on possession, above.

4. *Graham Stewart*, *op cit* n 2; *Crerar*, p 270.

5. *Alston's Tr; Sim*; being valid for the wadset too, pre 1696, see above, para 57.

6. At common law, *Union Bank v National Bank* (1885) 13 R 380 rev 14 R (HL) 1. By statute, the Conveyancing and Feudal Reform (Scotland) Act 1970, (c 35), s 13.

59. Other systems. Story, writing in 1829, attempted to compare the common and the civil law on this important matter. He states that under the former, subsequently contracted debts will be secured by the pledge if there is express or implied agreement by the parties to this effect.¹ Otherwise the later debt or debts will be unsecured. This would appear to remain the position under modern English law.²

As regards the civil law, Story points out that the law may well be different and that a pledgee has an automatic right to detain for "all sums". He tells us that Pothier was convinced this was the civil law, in particular being the law of France.³ Story then states it to be the law of Scotland, that unless there is the "clearest evidence" that the pledge is restricted to a particular debt it will secure all debts. However, for this he relies on a brief passage from Bell's *Commentaries* which predated Bell's thorough analysis of the subject in his *Principles* in which he departs from his previous viewpoint.⁴ Leaving this apart, Story is not wholly in agreement with Pothier's statement of the civil law :

"Perhaps it yet remains doubtful, whether the rule of the civil law was intended to apply to any cases, except those, in which there was an implication, that the subsequent debts should be tacked to the preceding by the consent of the parties."⁵

Such a conclusion is consistent with the views tentatively suggested above with regard to Scots law. However, in Spanish law where the parties have contracted further debts, the pledgee has the right to retain the property in respect of those debts which were demandable prior to the original debt being paid.⁶

In South Africa an express "all sums" pledge appears to be valid.⁷ On the other hand, if there is no express provision it is doubtful whether the pledged subject can be retained for debts other than the one for which it was first pledged.⁸ Moreover, it is clear that any such detention, in the absence of an express "all sums" clause, would be ineffective as against third parties.⁹

1. J Story, *Bailments*, (1829), s 304.

2. G W Paton, *Bailment in the Common Law*, (1952), p 359. He relies on *Demaimbry v Metcalf* (1715) Prec in Ch 419; 23 ER 1048 (cited by Bell, and Story himself).

3. Story, s 305, citing R Pothier, *Du Nantissement*, n 47. See now the *French Civil Code*, art 2082.

4. Bell, *Commentaries*, II,22. Proper analysis was lacking here : see Lord Handyside in *Hamilton v Western Bank* (1856) 19 D 152, 156 for a full discussion.

5. Story, s 305.

6. Spanish Civil Code, art 1866.

7. G Lubbe, *LAWSA*, vol 17, para 477.

8. *Ibid*, para 479.

9. *Ibid*, *Brink's Tr v SA Bank* (1848) 2 M 381; *Smith v Farrelly's Tr* 1904 TS 949.

6. SUBJECT MATTER

60. General. Bell's basic statement is that the "subject of pledge must be capable of delivery".¹ By this he means capable of *actual* delivery.² Therefore if a subject is not

capable of such delivery, for example, underground pipes, another method of creating a security must be found.³

1. Bell, *Principles*, s 205.

2. For of course land is capable of delivery : symbolical delivery.

3. *Darling v Wilson's Tr* (1887) 15 R 180 at 183, per Lord Justice-Clerk Moncreiff. However surely such pipes would be heritable as a result of accession : *Crichton v Turnbull* 1946 SC 52.

61. Corporeal moveables. In general any item of corporeal moveable property may be made the subject of a pledge.¹ Examples include silver plates;² clothing;³ yarn;⁴ brandy;⁵ horses;⁶ and jewellery.⁷ In practice only goods of a reasonable value which will be easily marketable in the event of the debtor's default are pledged.⁸ For example, it goes without saying that a gallon of milk will not be acceptable to secure a term loan of 6 months.

Where a pledge will frustrate the purpose of a statute, it will not be allowed. Thus in one case a company attempted to impignorate its Register of Shareholders.⁹ This breached its statutory duty to keep the document at its office to be open for public inspection and was consequently held to be invalid.

Other subjects which may not be pledged are the letters of guarantee of a company limited by guarantee.¹⁰

1. Bell, *Principles*, s 205; *Commentaries* II,21; A J Sim, *SME*, vol 20, para 15.

2. *Murray of Philiphauch v Cuninghame* (1668) 1 BS 575.

3. *Hariot v Cuningham* (1791) Mor 12405.

4. *Paton v Wyllie* (1833) 11 S 703.

5. *Hamilton v Western Bank* (1856) 19 D 152.

6. *Kirkwood and Pattison v Brown* (1877) 1 Guth Sh Cas 395.

7. *Wolifson v Harrison* 1977 SC 384.

8. Hume, *Lectures* IV,6-7.

9. *Liquidator of Garpel v Andrew* (1866) 4 M 617.

10. *Robertson v British Linen Co* (1890) 18 R 1225.

62. Bills of lading. These in law are regarded as the symbols of goods being shipped. Therefore the question of whether they may be pledged can be resolved into the question of whether it is permissible to constitute a pledge by symbolic delivery. This matter is dealt with fully elsewhere. However for the sake of convenience it is submitted here that bills of lading may indeed be pledged.¹

1. See below, para 94.

63. Incorporeal property. In general this may not be pledged.¹ The way in which a security is created over such property is by assignation.² It is of course possible for a debtor to deliver documents evidential of such property, eg a personal bond, into the hands of his creditor. If the debtor requires the documents, eg to get payment, then the creditor may be given a feeling of security. However, he has no real right of which he can avail himself against third parties, except that over the actual documents.³ Despite the continual description by the courts of a security over shares as a "pledge of shares", such a security is no such thing.⁴ It is an assignation and the creditor gets no real right in security until he becomes registered by the company as the shareowner.⁵

In Germany it is possible to pledge rights in much the same conceptual way as corporeal moveables.⁶ The laws of many other European countries take a similar approach.⁷ In South Africa, where there has been some German influence, there are moves in this direction. Its version of our assignation expressly in security, the *cessio in securitatem debiti*, has been viewed on occasion as amounting to a pledge of a debt.⁸ The result of this is that there needs to be no retrocession of the incorporeal which is the subject of the security, if and when the debtor/cedent discharges his debt due to the creditor/cessionary.⁹ Whether such jurisprudence will come to Scotland is a matter of conjecture.

1. Bell, *Commentaries*, II,22.

2. *Ibid*; *Strachan v McDougale* (1835) 13 S 954.

3. *Innes v Craig* 22 June 1821 FC, (1821) 1 S 82. Except if it is bearer paper.

4. For example, *Barron v National Bank* (1852) 14 D 565; *Coats v Union Bank of Scotland* 1929 SC (HL) 114.

5. *Ibid.*

6. BGB articles 1273-1296. "*Das Pfandrecht an Rechten*". See F Lent, *Sachenrecht : Ein Studienbuch*. (14th ed, by K H Schwab, 1974), pp 272-277 and M G Dickson, W Rosener and P M Storm (eds), *Security on Movable Property and Receivables in Europe*, (1988), pp 65-66.

7. For example, Belgium, Italy, Portugal and Spain. See *Dickson, Rosener and Storm, ibid.* For Holland, see W M Kleijn, J P Jordaans, H B Krans, H D Ploeger and F A Steketee, in J Chorus *et al*, *Introduction to Dutch Law*, (2nd ed, 1993), pp 84-87.

8. See S Scott, *The Law of Cession*, (2nd ed, 1991), chapter 12.

9. *Ibid.*, pp 232-233 and pp 238-239.

64. Negotiable instruments. As an exception to the general rule regarding incorporeals, negotiable instruments such as bills of exchange may be pledged.¹ The rationale is that the debt is inseparable from the piece of paper.² This brings us to a major problem. If there is such inseparability, it does not seem that there can be a valid pledge, for in pledge title remains in the pledger. Further, the giving of the instrument to a creditor will in most circumstances make him *holder* of the instrument.³ As holder, he is entitled to payment upon the instrument.⁴ This means he can realise his security without going to court which is where a pledgee must normally go for realisation.

These matters are problematic. Here is what Bell had to say in the 2nd edition of his *Commentaries* :

"The possession of a bill [of exchange] is held to be so strictly connected with the right, that the whole interest passes by indorsing the bill. And as bills thus impledged are blank indorsed, they are, in the eye of the law, completely transferred to the pledgee, under such condition as the parties have agreed upon."⁵

This passage clearly denies the possibility of a true pledge of a bill. However, in the 4th and subsequent editions of the same treatise, this passage has been reworked. Instead, Bell begins by writing that where the instrument is indorsed to the creditor or blank endorsed by the debtor, the creditor has all the rights of an onerous indorsee

being able to realise his security without judicial aid.⁶ Such a transaction, is the clear implication, should be treated as assignation rather than pledge.

This interpretation is confirmed by what Bell writes next. In the 4th edition, he says that sometimes "a bill is pledged without being indorsed".⁷ But in the 5th edition this has become sometimes "a bill is more correctly pledged without being indorsed".⁸ In this situation the creditor merely has the right to detain and can only indirectly operate payment of the debt secured.⁹ Obviously this means by going to court. As Gloag and Irvine point out, this passage can be interpreted narrowly or widely.¹⁰ It definitely covers the delivery of an order bill without indorsement to the creditor. However, it may also mean where a bearer bill has been similarly delivered in security. English authority which would be persuasive on this matter is inconclusive but logic at the end of the day points to the narrower interpretation.¹¹ In brief then, the following is suggested as being a statement of Scots law :

1. If an order negotiable instrument is indorsed in special or in blank by the holder to a creditor, or a bearer instrument is merely delivered to the creditor, then this operates as a transfer rather than a pledge of the instrument.¹² In other words if the creditor becomes the holder then the transaction is not pledge.

2. If an order negotiable instrument is delivered without indorsement to the creditor, then it is being pledged and not transferred.¹³ In this situation the creditor does not become the holder and will require judicial assistance to realise his security.

1. Bell, *Principles*, s 205; Hume, *Lectures*, IV,7; *Gloag and Irvine*, p 545. See also the American Law Institute, *Restatement of the Law of Security*, (1941), s 1.

2. Bell, *Commentaries*, II,23.

3. Unless it is an order bill which is not indorsed to the creditor.

4. Bills of Exchange Act 1882 (c 61) s 38.

5. Bell, *Commentaries*, (2nd ed, 1810), pp 443-44. A similar statement is made by Hume, *Lectures*, IV,7.

6. Bell, *Commentaries*, (4th ed, 1821), II,28; (5th ed, 1826), II,23; (7th ed, ed McLaren, 1870), II,23.

7. At II,28.

8. At II,23. In the 7th ed also at II,23.

9. *Ibid.* *Hogg v Muir, Wood and Co*, 18 May 1820 (unreported), which Bell discusses in footnote 3 suggests outright assignation rather than pledge, as "all sums" detention was allowed. His disapproval of it seems justified by logic.

10. *Gloag and Irvine*, p 608.

11. On the English authority, *Byles on Bills of Exchange*, (26th ed, 1988), pp 226-227 (a similar statement from an earlier edition being referred to by *Gloag and Irvine*, p 608) suggests the wider interpretation in denying the creditor a power of realisation. However, J Paget, *Law of Banking* (11th ed, 1996), p 582 suggests no such limit.

12. Bell, *Commentaries*, II,23.

13. *Ibid.* See also A J Sim, *SME*, vol 20, para 60.

65. Title deeds to heritable property. There is a disagreement between Hume and Bell on whether these may be pledged. Hume opines that they "cannot be detained from the purchaser, or heritable creditor [of the land] under the pretence of a pledge . . . in any one who has got the possession of the *ipsa corpora* as in security."¹ In contrast, Bell writes that as corporeal moveables they can be pledged, but do not give any right in the land.² The matter was settled in the Inner House in *Christie v Ruxton*,³ where Hume was preferred, the court regarding title deeds as having "no intrinsic value in themselves".⁴

Christie v Ruxton is often stated as being authority for the proposition that a security over heritage cannot be created by mere deposit of title deeds.⁵ In England such action results in an equitable mortgage over the land in favour of the deposittee.⁶ However, it was clear that no such result would happen in Scotland long before *Christie* and the point was not argued in the case.⁷ In Bell's words, the English position is "inconsistent with the genius of the Scottish law".⁸

1. Hume, *Lectures*, IV,7.

2. Bell, *Principles*, s 205.

3. (1862) 24 D 1182.

4. At 1185 per Lord Benholme. This point was also made by Hume, *op cit* n 1.

5. For example, W A Wilson, *The Scottish Law of Debt*, (2nd ed, 1991), p 99.

6. Bell, *Commentaries*, II,23-24. A written document signed by the parties is now also required. See the Law Reform (Miscellaneous Provisions) Act 1989, (c 34) s 2 and *United Bank of Kuwait plc v Sahib* [1996] 3 All ER 215.

7. Hume, *Lectures*, IV,7-8.

8. Bell, *Commentaries*, II,24.

66. Land. As we have seen, in early Scots law land could be pledged in much the same way as moveables.¹ However as the centuries went on the law of heritable and moveable security became bifurcated and it is quite clear that in 1997 land may not be pledged. The only way of creating a security over heritable property is the standard security.²

1. See above, para 19.

2. Conveyancing and Feudal Reform (Scotland) Act 1970, (c 35) s 9(3).

7. THE RULE NEMO PLUS JURIS AD ALIENUM TRANSFERRE POTEST, QUAM IPSE HABERET

67. General. For a person to be able to give a right of pledge over property, he must own that property or be authorised by its owner to pledge it.¹ The rule *nemo plus juris ad alienum transferre potest, quam ipse habet*² applies equally to the creation of a pledge as it does to the creation of any other real right. Here is Lord Kinnear :

"The general rule is perfectly well settled, that the possessor of corporeal moveables can give no better title to a purchaser or pledgee than he has himself acquired from the owner."³

The rule is axiomatic and applies in many legal systems.⁴ In one case a relict impignorated the moveables of the deceased including his heirship moveables. The heir had a good action against the possessor for their return.⁵ Good faith on the part of the pledgee is irrelevant.⁶ In another case the owner of jewels delivered them to another in custody. The custodier impignorated them to a third party who was in good faith. This was held to be no defence in an action for recovery of his property by the owner.⁷

1. Bell, *Principles*, s 1364; W M Gloag, *Encyclopaedia*, vol 11, (1931), para 773.

2. D.50.17.54. Also known as the rule *nemo dat quod non habet* : see K G C Reid, *SME*, vol 18, para 669. This abbreviated brocard may have come from the Commentators : see D L Carey Miller in D L Carey Miller and D W Meyers (eds), *Comparative and Historical Essays in Scots Law : A Tribute to Professor Sir Thomas Smith QC*, (1992), p 13, at p 17.

3. *Mitchell v Heys & Sons* (1894) 21 R 600, 610.

4. For English law, see *Attenborough v Solomon* [1913] AC 76 at 84, per Lord Haldane LC. See also the Spanish Civil Code, art 1857 and the Civil Code of Louisiana, art 3142. In German law, however, pledge by a non-owner will give the pledgee a real right (*dingliches Recht*) if the pledgee is in good faith. See the BGB, art 1207 and F Baur, *Lehrbuch des Sachenrechts*, (13th ed, 1985), pp 532-533.

5. *Semple v Givan* (1672) Mor 9117. See also *Ramsay v Wilson* (1665) Mor 9113 and *Tweddle v Duncan* (1841) 3 D 998.

6. *Gloag and Irvine*, p 203.

7. *Pringles v Gribton* (1710) Mor 9123. See also *McKellar v Greenock and Port Glasgow Loan Co* (1918) 34 Sh Ct Rep 93 and *McPhater v Smith Premier Typewriter Co Ltd* (1917) 33 Sh Ct Rep 301.

68. Possessor under contract of sale or return. If goods are sent to someone under a contract of sale or return (or sale on approbation) the question may be asked whether that person may validly pledge the goods. In *Brown v Marr, Barclay and Co*¹ a party had fraudulently obtained jewellery upon such a contract and then pawned it. The court viewed a contract of sale or return as a sale under a resolutive condition. In other words ownership passed to the fraudulent party subject to reversion to the seller if they were returned to him. Given this, the pledge was valid and despite the fraud the pawnbroker obtained an absolutely good title as he was in good faith.²

In the later case of *Macdonald v Westren*,³ the court took a different view of the contract of sale or return. It held that it was a sale under a suspensive condition, so where a person had obtained goods upon such a contract and then been sequestrated, the ownership of the goods in his possession was held to be with the seller. The opinions expressed in the two cases somewhat conflict.⁴

Not long after *Macdonald*, the Sale of Goods Act 1893 was passed. It provided that :

"Where goods are delivered to the buyer on approval or 'on sale or return', or other similar terms, the property therein passes to the buyer : (a) when he signifies his approval or acceptance to the seller, or does any other act adopting the transaction ; . . ."5

As Gloag and Irvine point out, it is clear that such a contract is one of sale under a suspensive condition.⁶ Their conclusion is therefore that a pledge in the circumstances outlined would be invalid.⁷ However, there is an alternative conclusion. That is that by pledging the property the buyer is doing an act which adopts the transaction.⁸ Thus ownership passes to him and the pledgee gets a good title. This alternative conclusion is the one which both the Scottish and the English courts have adopted.⁹ Further, its application happily is consistent with the conclusions reached by the courts in both *Brown* and *Macdonald*, although not admittedly with the reasoning expressed in the first case.¹⁰ To reiterate, then, the pledge of goods obtained under a contract of sale or return will confer a good title upon the pledgee.

1. (1880) 7 R 427.

2. *Ibid.* See also A J Sim, *SME*, vol 20, para 23.

3. (1888) 15 R 988.

4. See *Gloag and Irvine*, pp 246-247.

5. Sale of Goods Act 1893 (56 & 57 Vict c 71) s 18 (4). Now found in the Sale of Goods Act 1979 (c 54) as s 18 rule 4.

6. *Gloag and Irvine*, p 247.

7. *Ibid.*

8. P S Atiyah, *The Sale of Goods*, (8th ed, 1990), p 291.

9. *Bryce v Ehrmann* (1904) 7 F 5; *Kirkham v Attenborough* [1897] 1 QB 201; *London Jewellers Ltd v Attenborough* [1934] 2 KB 206.

10. That was, that a contract of sale or return amounted to a sale under a resolutive condition.

69. Owner with voidable title. The rule is that if a person holding a voidable title to property pledges the goods to another who is in good faith and gives value before

his own title is avoided, then the pledge is absolutely good.¹ The cardinal example of the voidable title holder is the fraudster.² This echoes the rule where ownership is being transferred.³ According to Gloag, the onus of proof that the pledgee, in such circumstances, did not take in good faith, rests on the owner of the goods.⁴ He can only cite English authority to support this conclusion.⁵

1. *Brown v Marr, Barclay and Co* (1880) 7 R 427.

2. As in *Brown, ibid*. See W M Gloag, *Encyclopaedia*, vol 11, para 776.

3. Sale of Goods Act 1979 (c 54), s 23.

4. *Gloag, op cit*, n 2.

5. *Whitehorn v Davison* [1911] 1 KB 463. The same rule probably applies here due to the presumption in favour of the evidence of the pledgee arising out of his possession : see *Harriot v Cuninghame* (1791) Mor 12405.

70. Agents. Property may be pledged on behalf of its owner by an agent.¹ The validity of the pledge will depend on whether the agent has authority, express or otherwise, from his principal to pledge the goods.² A mere depositary certainly has no such authority.³

It appears that at common law in Scotland factors had a general power to pledge the goods of their principals.⁴ Therefore pledgees were protected if it turned out that in fact there was no express authority for the particular pledge in question.⁵ However this was not the position in England where a series of statutes was passed in the nineteenth century to give those transacting with factors some protection.⁶ The consolidating statute was extended to apply to Scotland also and its inter-relation with the common law is somewhat unclear.⁷ It is not intended to pursue the matter here, where focus will be placed upon the statutory provisions.⁸

The Factors Act 1889 applies to mercantile agents and *mercantile agent* is defined as :

"a mercantile agent having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods".⁹

The Act goes on to provide that where such an agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent shall be valid as if he were expressly authorised by the owner of goods to make the same.¹⁰ The person taking under the disposition, for our purposes the pledgee, must be in good faith and not have notice at the time of the disposition that the agent had no authority to do what he is doing.¹¹ It has been held that a forwarding agent who has goods left in his hands to be forwarded is not a factor and may not validly pledge.¹²

1. Bell, *Principles*, s 1364 ("delivery can be given effectually only by one having the ownership or disposal"); *Gloag and Irvine*, p 203; A J Sim, *SME*, vol 20, para 21. See also the Civil Code of Louisiana, arts 3145 and 3146.

2. A J Sim, *ibid*; K G C Reid, *SME*, vol 18, para 670.

3. *Stuart v McGregor* (1829) 7 S 622; *Smith v Allan & Poynter* (1859) 22 D 208.

4. *Mitchell v Burnet & Mouat* (1746) Mor 4468; *Colquhoun v Findlay, Duff and Co* 15 Nov 1816, FC.

5. See Lord Rodger, "Pledge of Bills of Lading in Scots Law", 1971 JR 193, at p 211.

6. See J J Gow, *The Mercantile and Industrial Law of Scotland*, (1964), pp 105ff.

7. Factors Act 1889 (52 & 53 Vict c 45) extended to Scotland by the Factors (Scotland) Act 1890 (53 & 54 Vict c 40) s 1.

8. See Gow, *op cit*, n 3.

9. Section 1(1).

10. Section 2(1).

11. *Ibid*.

12. *Martinez y Gomez v Allison* (1890) 17 R 332.

71. Personal Bar. Where the pledger has neither title nor authority to pledge the property but the owner of it has acted in such a way as to let the pledgee be misled into believing that the pledger is the owner or has authority to pledge it, then the owner is personally barred from denying the pledge.¹ Personal bar is a general legal doctrine and its application to pledge is carefully examined by Gloag and Irvine.² In

their view two factors must be present to enable personal bar to operate against an individual, namely (1) that he must have conducted himself in a manner calculated to mislead another and (2) that the other must have been actually misled by reliance on that conduct.³

Giving another individual possession of one's property does not amount to an act calculated to mislead third parties, for mere possession of a corporeal moveable generally does not give the possessor power to transfer it or create rights over it.⁴ As Gloag and Irvine state, it is difficult to imagine circumstances in which personal bar will arise in a pledge context.⁵ The point is borne out by an absence of case law.⁶

1. See A J Sim, *SME*, vol 20, para 23.

2. *Gloag and Irvine*, pp 203-206.

3. *Ibid.*, at p 204. See Lord Kinnear in *Mitchell v Heys and Sons* (1894) 21 R 600, at 610.

4. *Gloag and Irvine*, pp 204-205.

5. *Ibid.*

6. The two cases analysed by *Gloag and Irvine* are not true pledge cases. *Mitchell, op cit*, concerns lien. *Pochin & Co v Robinow & Marjoribanks* (1869) 7 M 622 concerns a transfer in security.

72. Buyers and sellers in possession. Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery by that person, or by a mercantile agent acting for him, of the goods or documents of title, under a pledge, to any person receiving the same in good faith and without notice of the original seller's rights will have the same effect as if the person making the delivery were a mercantile agent in possession of the goods or documents of title with the consent of the owner.¹ Likewise, where the seller of goods or his mercantile agent, having sold the goods, remains in possession of the goods or documents of title to them, a pledge of these to a pledgee receiving the same in good faith and without notice of the previous sale, will have the same effect as if the owner of the goods had given express authority to the seller to pledge.²

1. Sale of Goods Act 1979 (c 54) s 25(1); Factors Act 1889 (c 45) s 9. See P S Atiyah, *The Sale of Goods*, (8th ed, 1990), pp 376-388.

2. Sale of Goods Act 1979 s 24; Factors Act 1889 s 8. See Atiyah, *ibid*, pp 371-375.

73. Hire Purchasers. A contract of hire purchase is one where property is taken on hire and the hirer is granted an option to purchase it on fulfilling certain conditions stipulated in the contract.¹ Therefore a hire purchaser does not have ownership of the property and it would be presumed that the rule *nemo plus juris ad alienum transferre potest, quam ipse haberet* would apply if he purported to pledge them. However, in two Sheriff Court cases it has been held that a pledge by a hire purchaser is valid. In *Acme Machine Co v Scanlan*,² where two Acme wringing machines had been pawned, the parties found themselves before Sheriff Guthrie. He opined that Acme in allowing their property to be hire purchased were responsible for letting the fraudulent pawning be committed.³ He said that pawnbrokers were under no duty to take "extraordinary precautions to ascertain that the title to the machines is satisfactory." "In general", he continued, "the actual possession of moveables presumes property".⁴ The case at its heart seems based upon a vague notion of personal bar.

The second case, *Benton and Co v Rowan*⁵ has much the same ratio. The sheriff makes a questionable comparison with a case where a person fraudulently had obtained goods on sale or return.⁶ In that situation the person can confer good title; a hire purchaser generally cannot.⁷

The sheriffs' conclusions are too wide an interpretation of personal bar to accept. As has been seen, personal bar only operates where the true owner has acted in a manner calculated to mislead third parties and there has been reliance on his actings by the party raising the doctrine.⁸ Entering into a contract of hire purchase and handing over possession in terms of that contract cannot be said to be activity which is calculated to mislead. Pressed to a logical conclusion, the sheriff's conclusions mean that one who hires out his goods to someone who then pawns them, would also have to pay the pawnbroker to get them back. And, to be consistent, if the goods were sold rather than pawned, the buyer would get a good title. Acceptance of this would confer on a hirer the same power to confer title as a buyer or seller in possession, a power which only exists under statute.⁹

The true backdrop to the cases is judicial dislike of hire purchase. The sheriff in *Benton* described it as :

"a bad system, leading to deception, imposition, and litigation, and worst of all, involving the ignorant and improvident of the poor into undertaking to pay for articles prices far beyond their true value".¹⁰

However, he makes a concession at the end of the judgement. He does not allow the pawnbroker interest and expenses because of the nature of the items pawned. He says :

"I think the look of these new, paltry toys ought to have excited manifold suspicions in the mind of any man of skill who would pause to conjecture the probabilities of their history."¹¹

The items in question were wrist watches.

In the same year as *Benton*, the House of Lords in an English case held that as a hire purchaser does not own the goods subject to the contract of hire purchase, he therefore may not validly pledge them.¹² Further, he does not fall within the provisions of the Factors Acts as a person who has "bought or agreed to buy goods" and therefore cannot validly pledge upon that basis.¹³ This decision was followed without question or discussion in a later Scottish Sheriff Court case.¹⁴ *Acme and Benton* cannot be regarded as good law.

1. See W M Gloag and R C Henderson, *Introduction to the Law of Scotland*, (10th ed, 1995), para 16.51.

2. (1887) 3 Sh Ct Rep 148.

3. At 149.

4. At 149-150.

5. (1895) 11 Sh Ct Rep 144.

6. *Brown v Marr, Barclay and Co* (1880) 7 R 427, discussed above, para 68.

7. A person who obtains goods upon sale or return, adopts a sale by pledging them and thus can confer a good title. This is the case even if he is a fraudster provided that the pledgee is in good faith and the pledge takes place before the original contract is avoided. See above paras 68 and 69.

8. See above, para 71.

9. See the previous paragraph.

10. (1895) 11 Sh Ct Rep 144, 145, per Sheriff Campbell Smith.

11. *Ibid.*

12. *Helby v Matthews* [1895] AC 471.

13. Factors Act 1889 (c 45) s 9; Sale of Goods Act 1979 (c 54), s 25(1).

14. *Singer Sewing Machine Co Ltd v Quigley* (1914) 30 Sh Ct Rep 56.

74. Lack of title or authority : consequences. If the pledger neither owns the property in question nor has authority from its owner to pledge then the pledgee does not obtain a real right in the property.¹ He will have a personal action against the pledger and it is suggested that the basis of this action is breach of warrandice.² In practice such an action would probably be pointless. If the pledger is solvent, the debt will be repaid anyway and the non-existence of the pledge will not matter. If the pledger is insolvent, a personal action against him will be of no avail.

1. Bell, *Principles*, s 1364.

2. Cf English law where the pledgor warrants that he has title to the property and is liable in damages if he has not : *Cheesman v Exall* (1851) 6 Ex 341; G W Paton, *Bailment in the Common Law*, (1952), p 353.

8. PLEDGE BY A PLEDGEE

75. General. The question of whether a pledgee may himself validly pledge the property already pledged to him, while retaining his own right of pledge, has never been authoritatively resolved in Scots law. Such a transaction has been called both *subpledge*¹ and *repledge*.² The present writer, however, is not happy with either word. *Subpledge* suggests a subordinate pledge being created over the original pledge, that is a right in security in a right in security. This inaccurately reflects what is going on, for a pledge is an incorporeal right and incorporeals generally cannot be pledged.³ Rather what is happening is that property already pledged is

purportedly being made the subject of a second pledge, with the original pledgee now acting as a pledger. *Repledge* is too wide a term. For instance, it could simply refer to the situation where property released from a pledge is pledged once more.

1. For example, W Guthrie, in Bell, *Principles*, s 206; *Gloag and Irvine*, p 212; A J Sim, *SME*, vol 20, para 25.

2. For example, G W Paton, *Bailment in the Common Law*, (1952), p 368; N E Palmer, *Bailment*, (2nd ed, 1991), p 1402.

3. See above, para 63.

76. The English approach. The English law in this area was set down by the Queen's Bench Division in the important case of *Donald v Suckling*.¹ There it was held by three judges to one that where a pledgee himself pledges the impignorated property to a third party without the pledger's authority, the pledger will be unable to recover the property from the third party until he discharges the debt secured by the original pledge.² The action of the pledgee may well amount to a breach of contract on his part, but not one so fundamental to extinguish the pledge.³

The majority were influenced by Story, although in the end going further than the American writer.⁴ Story had opined that a pledge by a pledgee would be upheld, but not if the second pledge was for an amount more than the original debt.⁵ In fact this was the situation in *Donald*. Yet the majority would not let the pledger recover his property until he paid over the sum for which it was pledged. In a later case, *Donald* was followed, it being held that where the pledged property is damaged as a result of the second pledge, the pledger will only have a claim against the pledgee for damages once he discharges the original debt, for until then he has no right to regain possession of the subject.⁶

1. (1866) LR 1 QB 585.

2. See generally, G W Paton, *Bailment in the Common Law*, (1952), pp 368-369; N E Palmer, *Bailment*, (2nd ed, 1991), pp 1402-1404.

3. Cockburn CJ at (1866) LR 1 QB 585, 618 seems to be of the view that there is a breach of contract by the pledgee. Mellor J at p 608 apparently believes that there is no breach. For discussion, see Palmer, *ibid*, at pp 1403-1404. See also M G Bridge, *Personal Property Law*, (2nd ed, 1996), p 148.

4. See Mellor J at pp 606-607 and Blackburn J at pp 613-614.

5. J Story, *Bailments*, s 324.

6. *Halliday v Holgate* (1868) LR 3 Ex 299.

77. **Scots law authorities.** The English rule, that a pledgee does not amount to a complete repudiation of his obligations under the original pledge and that the pledger still must discharge the secured debt to recover his property, is set out in all the modern works on pledge south of the border.¹ All seem agreed. However, in Scotland we have dissensus, there being no decided case turning upon the matter.² Sheriff Guthrie, in one of his addenda to Bell's *Principles*, adopts the English rule *carte blanche*.³ Gloag and Irvine effectively do the same, although they put particular emphasis on the point that the original pledge contract may bar pledge by the pledgee.⁴ Writing some thirty years later, Gloag simply represents *Donald v Suckling* as the law of Scotland.⁵ Hume opined that a pledgee might not impignorate the pledged property himself, unless the original contract of pledge expressly permitted such action.⁶

Let us start with a more modern writer. Sim doubts whether a subpledge, as he calls it, is valid unless the pledgee has either express or implied power to constitute it.⁷ Here is his reason :

"A pledgor might be content to entrust, say a valuable painting to a pledgee of his choosing, but might be far from willing that it should be sub-pledged to another."⁸

Although this point has value, the law on this singular matter is surely already clear. All three of the judges in the majority in *Donald* stated that where the pledged property was of a special character the pledgee was not allowed to part with it.⁹ It seems safe to assume that our law too requires the same where there is *delectus personae* in the pledge contract.

Returning to the problem in general, there are in fact four reasons why the law of Scotland is not in accordance with the law of England here. The first three are capable of variance by contract; the fourth is not.

1. G W Paton, *Bailment in the Common Law*, (1952), pp 368-369; *Halsbury*, vol 36, para 125; N E Palmer, *Bailment*, (2nd ed, 1991), pp 1402-1404; M G Bridge, *Personal Property Law*, (2nd ed, 1996), p 148.

2. There is, however, a valuable long obiter passage on the matter in the judgement of Lord Maxwell in *Wolfson v Harrison* 1974 SLT (Notes) 55 (OH).

3. At para 206.

4. *Gloag and Irvine*, p 212.

5. W M Gloag, *Encyclopaedia*, vol 11, para 769.

6. Hume, *Lectures*, IV,2.

7. A J Sim, *SME*, vol 20, para 25.

8. *Ibid*.

9. Mellor J at (1866) LR 1 QB 585, 608; Blackburn J at 615 and Cockburn CJ at 618.

78. Reason (1) : The absence of any right in the pledgee to use the pledged property. In English law the pledgee is generally entitled to make use of the property pledged to him.¹ The Scottish pledgee, bar one narrow exception, has no such right.² It is submitted therefore that he may not himself pledge the property. For, by doing this in order to obtain a loan from the third party to whom he is making the pledge, the pledgee is surely using the pledged property to get credit.³ This certainly is the obiter opinion of Lord Maxwell :

"I cannot see the logic of saying that a pledgee may not 'use' the subjects without express agreement (Bell [s 206]), Gloag and Irvine, *Rights in Security*, p 213) and at the same time saying that he may, for example, sub-pledge them".⁴

It must be admitted that our law does not regard the use of pledged property as a breach of the pledge contract so fundamental as to bring it to an end.⁵ However, the position of Scots law with regard to use as opposed to that of English law, points to the two systems taking a different approach as regards pledge by a pledgee in general.

1. See below, para 97.

2. *Ibid.* The exception is where use is necessary to maintain the value of the property.

3. Admittedly not physical use.

4. *Wolifson v Harrison* 1974 SLT (Notes) 55, 57.

5. Hume, *Lectures*, IV, 2-3; *Kirkwood and Pattison v Brown* (1877) 1 Guth Sh Cas 395; *Wolifson v Harrison* 1977 SC 384.

79. Reason (2) : The absence of any right in the pledgee to "deal" with the pledged property. In English law a pledgee has the "whole present interest" in the pledged subject.¹ This interest allows him lawfully to give up possession of the property to an assignee or a pledgee of his own.² Further, on default the pledgee has an implied right to sell the property.³ The power of the pledgee to deal with the subject pledged is shown by the case of *Johnston v Stear*.⁴ There the pledgee sold the pledged goods a day before he was entitled to. However, the court held that "the wrongful act of the pawnee did not annihilate the contract between [pawner and pawnee] nor the interest of the pawnee in the goods under that contract."⁵ Without discharging the debt, the pawner could not recover his property. Thus in terms of English property law, a pledgee can give third parties rights in the pledged property. He may well be in breach of contract. However, he will not be liable in damages and the rights of the third party will remain protected until the pledger discharges the debt which the property secured.

In Scotland a pledgee does not have the "whole present interest" in the pledged property : he has a subordinate real right in it.⁶ He has no implied right to assign his pledge.⁷ He has no implied right to sell the property on default.⁸ A sale by a pledgee who has no right to sell is completely ineffectual.⁹ Scots and English law differ here and this is the second reason why a pledge by a pledgee is not permissible north of the border.

1. Per Wilkes J in *Halliday v Holgate* (1868) LR 3 Ex 299, 302. The "interest" is commonly referred to as "special property", for example by Cockburn CJ in *Donald v Suckling* (1866) LR 1 QB 585, or in *Halsbury*, vol 36, para 104. Lord Mersey in *The Odessa* [1916] 1 AC 145 at 158-159 prefers the term "special interest".

2. *Mores v Conham* (1609) Owen 123 at 124; 74 ER 946 at 947 per Fleming CJ; *Donald v Suckling* (1866) LR 1 QB 585; *Halsbury*, vol 36, para 125; N E Palmer, *Bailment*, (2nd ed, 1991), p 1402-1404.

3. *Re Morritt, ex parte Official Receiver* (1886) 18 QBD 222; *Re Hardwick, ex parte Hubbard* (1889) 17 QBD 690; *The Odessa* [1919] AC 145 at 149 per Lord Mersey; Halsbury, *ibid*, para 128; Palmer, *ibid*, p 1410.

4. (1863) 15 CBNS 330; 143 ER 812.

5. 15 CBNS 334-335.

6. See above, para 5.

7. See above, para 53.

8. *Stair*, I.13.11; *Erskine*, III.1.33; Bell, *Principles*, s 207. See below, para 105.

9. *Hislop v Anderson* (1919) 35 Sh Ct Rep 116.

80. Reason (3) : The rule *nemo plus juris ad alienum transferre potest, quam ipse haberet*. As we have seen, this rule applies equally to the creation of pledge as it does to the creation of any other real right.¹ Given that a pledgee does not own the pledged property, the rule must mean that a pledge by him is completely ineffectual, unless the pledger gave him express or implied authorisation to do the same. This very point was noted by Shee J, the dissenting judge in *Donald v Suckling*.² However, his fellow judges avoided the problem by focusing on the "interest" which a pledgee under English law apparently has in the pledged property.³ It is submitted that Scots law is incapable of overriding *nemo plus* in this fashion.

1. See above, para 67.

2. (1866) LR 1 QB 585, 600-601. The interesting point about Shee J's judgement as a whole is that he relies on *Stair*, *Erskine* and Bell, a point noted by Lord Maxwell in *Wolifson v Harrison* 1974 SLT (Notes) 55, 58.

3. For example, Mellor J at 613 and Cockburn CJ at 618-619.

81. Reason (4) : The rule *mobilia non habent sequelam*. Three reasons have already been given why it is thought that a pledgee may not validly repledge the security subjects in Scotland. They would indicate that Gloag and Guthrie are misguided on this matter.¹ However, Hume may still be correct when he states that a pledgee given power to pledge may validly do so.² For, it is clear that as a matter of contract a pledger could give a pledgee power to pledge, just as he could give him

power to use the pledged property or a power to sell it. Clearly, the *nemo plus* rule cannot apply if the pledgee's actions are authorised.

In terms of contract law Hume is correct. In terms of property law he is incorrect. For, by the operation of the maxim *mobilia non habent sequelam*, the delivery of the pledged property by the pledgee to his own pledgee will bring his right of pledge to an end.³ Here is Erskine :

"[I]n a pledge of moveables, the creditor who quits the possession of the subject loses the real right he had upon it".⁴

This very statement was relied upon by Shee J, the dissenting judge in *Donald v Suckling*.⁵ Bell made the same point in more than one place.⁶ It may be argued that here the pledgee remains in civil possession through his own pledgee.⁷ This, however, is of little assistance. For Scots law only sanctions a pledgee with natural possession delivering it to another and retaining only civil possession for the most limited of purposes.⁸ Pledging to a third party is not one of them.

Consequently, the effect of the pledgee pledging to a third party is that the third party does acquire a real right, where the pledgee has the authorisation of the pledger. However, in giving up possession the pledgee loses his own right of pledge. Thus only the third party now has a subordinate real right in the property. In effect the pledge has been assigned. It is simply not possible for the pledgee to pledge the property to a third party and at the same time maintain his own right of pledge.

1. That is, in regarding Scots law to be the same as English law. See above, para 78.

2. Hume, *Lectures*, IV,2.

3. The maxim is used by *Bankton*, I.17.1 and 3 in relation to pledge but apparently not since. For discussion, see H S Silberberg and J Schoeman, *The Law of Property*, (3rd ed, 1992), pp 479-480.

4. *Erskine*, III.1.33.

5. (1866) LR 1 QB 585, 603.

6. Bell, *Principles*, ss 206 and 1364; *Commentaries* II,22. See also W M Gloag, *Encyclopaedia*, vol 11, para 771.

7. The law of Louisiana takes this approach. See R Slovenko, "Of Pledge", (1958) 33 Tul LR 59, at p 95. See also American Law Institute, *Restatement of the Law of Security*, (1941), pp 83-85.

8. See, below, paras 101-103.

82. Summary. Under Scots law, a pledgee has no right to pledge the impignorated property to a third party. If the pledgee is given power by the pledger to do this, the third party does obtain a real right. However, the surrender of possession on the part of the pledgee results in him losing his own real right. Scots law does not permit pledgees to pledge the property to a third party, whilst retaining a real right of pledge themselves.¹

1. See above, paras 78-81.

9. CONSTITUTION OF PLEDGE

83. General. The real right of pledge in a moveable subject is constituted by delivery of the subject to the pledgee, in terms of an agreement between pledger and pledgee to do the same.¹ Consequently, pledge involves an *animus* or mental element in terms of the parties' respective intentions to transfer and to receive possession for this purpose, along with a *corpus* or physical element in terms of the act of delivery.² The agreement between the parties is a matter governed by the law of obligations; the delivery thereupon is governed by the law of property.³

1. See above, para 5. A similar approach is taken in most systems. See, for example, the Civil Code of Spain, arts 1857 and 1863; the BGB, art 1205; the French Civil Code, art 2071 and the New Netherlands Civil Code, arts 3.227 and 3.236.

2. See D L Carey Miller, *Corporeal Moveables in Scots Law*, (1991), para 11.04.

3. The position is the same in South Africa : see G Lubbe, *LAWSA*, vol 17, para 485.

84. Pledge as a real contract. Under Roman law, pledge or *pignus* was one of the four real contracts.¹ By that law, such contracts were not constituted until delivery. Therefore, originally at least, an agreement to pledge was unenforceable until the debtor delivered the subject matter to the creditor.² The acceptance of non-possessory security by the later Roman law greatly reduced the importance of this

rule. However, all the major Scots institutional works treat pledge as a real contract.³ The logical deduction to make from this is that under Scots law if X agrees to pledge his watch to Y and then changes his mind before delivery, there is no contract so X may not be compelled to deliver nor be liable in damages. Such a conclusion is a worrying one and it is therefore not surprising that the law is in fact otherwise. Here is Erskine :

"If there was barely an obligation to give [a subject in pledge with no delivery], it resolved into a *nudum pactum*, which by the Romans, was not productive of an action. But, by the law of Scotland, one who obliges himself to give . . . in pawn, may be compelled by an action to perform; though indeed, before the subject be . . . impignorated, it does not form the special contract of . . . *pignus*."⁴

Bell says something similar.⁵ It is fair to take issue with the statement that the special contract is not formed until delivery. What he is trying to say is that the contract is useless in terms of creating a security unless there is delivery, for until then the creditor has no real right. Bankton seems to have a better understanding of the matter :

"[I]f the proprietor only covenants a pledge, or hypothec on his goods . . . and retains them still in his own possession, all who purchase from him the same are safe . . . no conventional pledge in moveables being competent by our law, without delivery of the same to the creditor; at the same time the debtor who evacuates such covenanted security is guilty of breach of faith, and liable to the creditor in damages upon that head."⁶

To summarise, an agreement to pledge is a contract which may be enforced by specific implement and which will give rise to a claim for damages if its terms are breached.⁷

1. See B Nicholas, *An Introduction to Roman Law*, (1962), pp 167-171 and R Zimmermann, *The Law of Obligations*, (1990), chapters 6-7. The others were *mutuum* (loan for consumption), *commodatum* (loan for use), and *depositum* (deposit).

2. Nicholas, p 167; Zimmermann, p 221.

3. *Stair*, I.13.11; *Bankton*, I.17; *Erskine*, III.1.33; Bell, *Principles*, s 203. In actual fact, *Regiam*, Balfour and Hope treat pledge in close proximity to the other real contracts, indicating the Roman influence upon them.

4. *Erskine*, III.1.17.

5. Bell, *Principles*, s 17.

6. *Bankton*, I.17.1. See also Hume, *Lectures*, IV.1.

7. The measure of damages is unclear.

85. Validity of the contract. Like any other contract certain pre-requisites are required to make it valid. The parties must have reached consensus about what they are doing, they must not be under undue influence and they must have the relevant legal capacity.¹ Writing, although in practice desirable, is not required except in the case of a pledge regulated by the Consumer Credit Act 1974 ie a pawn.² This contrasts with some other jurisdictions. In France, a civil pledge (*gage civil*) requires either a document drawn up by a notary or a private contract which is then registered.³ In Spain, a pledge is not valid against third parties unless its terms are set out in a public deed executed before an authenticating officer such as a notary public.⁴

In the absence of writing the parties' intentions will be inferred from their actings in relation to possession.⁵ The intentions must indicate nothing which is inconsistent with the creation of a real right of pledge.⁶

1. See W M Gloag and R C Henderson, *The Law of Scotland*, (10th ed, 1995), chapters 4-9.

2. Bell, *Principles*, s 204; *Taylor v Nisbet* (1901) 4 F 79 per Lord Moncreiff at 86. Under the Consumer Credit Act 1974 (c 39), the pawnee is obliged to issue the pawner with a copy of their agreement, notice of his cancellation rights and a pawn-receipt with a specified form and content : s 115; Consumer Credit (Pawn-Receipts) Regulations 1983 (SI 1983 No 1566).

3. French Civil Code, art 2071. In contrast, a pledge in the course of a business (*gage commercial*) does not require writing.

4. Spanish Civil Code, art 1865; M G Dickson, W Rosener and P M Storm (eds), *Security on Movable Property and Receivables in Europe*, (1988), p 255.

5. D L Carey Miller, *Corporeal Moveables in Scots Law*, (1991), para 11.05.

6. The parties did not pass this test in *Mackinnon v Max Nanson and Co* (1868) 6 M 974, where the contract allowed the debtor to remove the items from the creditor's possession. See *Carey Miller*, p 234.

86. Proof of contract. Pledge has always been provable by parole evidence.¹ There is an evidential presumption in favour of the pledgee as against the pledger because he is in possession of the property.² The acceptance by the law of parole evidence to prove a pledge contrasts with the position of loan at common law. Loans required to be proved by writ or oath.³ Given that pledges invariably secure loans, this led to a somewhat perplexing situation. When the matter came up for decision in the Sheriff Court, the sheriff noted the "apparent inconsistency".⁴ However, he was of the view that the favour which the law shows to possession sufficiently accounted for the relaxation in the case of pledge of the rule that loan must be provable by writ or oath.⁵ The matter has been made academic by the Requirements of Writing (Scotland) Act 1995, which abolished proof by writ or oath⁶

1. Bell, *Principles*, s 204; A G Walker and N M L Walker, *Law of Evidence*, (1964), p 152; *Hariot v Cuningham* (1791) Mor 12405; *Walker v Scottish & Newcastle Breweries Ltd* 1970 SLT (Sh Ct) 21.

2. *Hariot v Cuningham* (1791) Mor 12405.

3. *Stair*, IV.43.4.

4. *Niven v McArthur's Trs* (1907) 23 Sh Ct Rep 299.

5. *Ibid.*

6. Requirements of Writing (Scotland) Act 1995, (c 7), s 11.

87. Private knowledge of a prior right. Due to an absence of case law on the subject, it is not clear whether the doctrine of "offside goals" applies to pledge.¹ To give the paradigm case, if A agrees to pledge to B and then does the same with C who is in bad faith and takes delivery, it is not clear whether B can reduce C's right. However, the position is equally unclear if rather than pledging to C, A transferred to him ownership of the property in question. In South Africa, the "offside goals" rule, or the "doctrine of notice" as it is called there, does apply to pledge.² It applies in Sweden too.³

Despite the lack of authority, it may be suggested with a reasonable level of confidence that the rule will apply in the first example which has been outlined. Undertaking to pledge to B and then pledging to C is very similar to agreeing to sell to B and then selling to C. In that case of "double sale" the rights of B and C are incompatible and it is clear that the "offside goals" rule applies. The same incompatibility exists in the case of pledge so it is submitted the rule applies here too.

The way in which Professor Reid's reformulation of the Scots law on "offside goals" has gained acceptance by the courts would suggest that the rule applies in the second situation given above, as well as in other similar cases.⁴ On this however we cannot be so sure.

1. On this doctrine generally, see K G C Reid, *SME*, vol 18, at paras 695-700.

2. See G Lubbe, *LAWSA*, vol 17, para 488; H S Silberberg and J Schoeman. *The Law of Property*, (3rd ed, 1992), p 72; *Wille's Law of Mortgage and Pledge in South Africa*, (3rd ed, ed T J Scott and S Scott, 1987), pp 58-59; *Coaton v Alexander* (1879) 9 Buch 17.

3. B Helander in J G Sauveplanne (ed), *Security over Corporeal Movables*, (1974), at p 249, 252.

4. See *Scotlife Home Loans (No 2) Ltd v Mair* 1994 SCLR 791, 795 per Sheriff Principal Maguire.

10. DELIVERY

88. General. The subject matter of the pledge must be delivered to the pledgee to give him a real right in it.¹ On this subject, Scots law has affixed itself to the original principles of the Roman *pignus*.² Anything resembling the later *hypotheca*, which as we saw became assimilated with *pignus*, is not countenanced.³ Here is Stair :

"But our custom hath taken away express hypothecations, of all or a part of the debtor's goods, without delivery . . . [so] that commerce may be the more sure".⁴

The rule which demands possession for accomplishment of the real right has been explained by Gloag and Irvine and subsequently repeated by others as a general rule

embracing all security over moveable property.⁵ Sim explains the thesis the most succinctly :

"The rule expressed in the maxim *traditionibus, non nudis pactis, dominia rerum transferentur* makes possession by the creditor a pre-condition for the validity of his security right in a question with a competing purchaser for value or a liquidator or trustee in sequestration."⁶

However, surely the thesis is misguided. The Latin maxim comes from the Codex of Justinian and concerned transfer of *dominium* ie ownership.⁷ It had absolutely nothing to do with the creation of security in Roman law. Now, of course, one can correctly use it when referring to an *ex facie* absolute transfer of moveables which will require delivery. But that is not because it is a method of creating a security, it is because it involves transfer of ownership. Pre 1893 in Scotland the maxim applied to every transfer of moveables. Then statute altered the position for sale, while expressly providing that transfers in security were still to be governed by the common law.⁸ All the cases where attempts were made to avoid delivery by using a sham sale were simply attempts to avoid the general common law on transfer of ownership.⁹ Casting them as attempts to avoid a specific principle of no security without possession is misleading.

As for pledge, the demand for delivery comes from two specific sources and has nothing to do with the brocard *traditionibus, non nudis pactis, dominia rerum transferentur*. Firstly, as Stair says, it comes from custom, in other words Scots common law.¹⁰ We saw that in the Middle Ages the royal courts were unwilling to enforce pledges where there had been no delivery.¹¹ As Bell wrote :

"In this country the common law very early declared itself against conventional hypothecs. This repugnance may be traced back to the days of Sir James Balfour (p 194) and even to the *Regiam Majestatem* (lib 3, c 3)".¹²

The second source is the continental civilian systems which have also shunned conventional hypothecs.¹³ When Stair wrote his *Institutions* in 1681, he must have been aware that the non-possessory pledge had been rejected in early Scots law and in civilian Europe. Commerce is indeed "the more sure" without the conventional

hypothec, which has been almost completely rejected by our common law.¹⁴

1. *Bankton*, I.17.1; Bell, *Principles*, s 1364.

2. See above para 15.

3. See above para 18.

4. *Stair*, I.13.14. See too, *Bankton*, I.17.7; *Erskine*, III.1.34; Bell, *Principles*, s 1385.

5. *Gloag and Irvine*, pp 188 *et seq.* Disciples of this approach include Lillie in *The Mercantile Law of Scotland*, (6th ed, 1970), p 88, and E A Marshall, *Scots Mercantile Law*, (2nd ed, 1992), para 7-15.

6. K G C Reid, *SME*, vol 20, para 8.

7. C.2.3.20 (Diocletian, 293) : *Traditionibus et usucapionibus dominia rerum non nudis pactis transferentur*. See also D.50.17.54. See W M Gordon, "Roman Influence on the Scots Law of Real Security", in R Evans-Jones (ed), *The Civil Law Tradition in Scotland*, (1995), p 157, at p 170.

8. Sale of Goods Act 1893, (56 & 57 Vict c 71), ss 17, 18 and 61(4); now Sale of Goods Act 1979, (c 54), ss 17, 18 and 62 (4).

9. See *Gloag and Irvine*, pp 221-236.

10. *Stair*, I.13.14.

11. Above, paras 24 and 36.

12. Bell, *Commentaries*, II,25.

13. See Bell, *Commentaries*, II,25; T B Smith, *A Short Commentary on the Law of Scotland*, (1962), pp 472-474. The need for delivery remains in these systems today. See, for example, the BGB, art 1205 and the Civil Code of Spain, art 1863.

14. The exceptions being the (now obsolete) bonds of bottomry and respondentia. See *Gloag and Irvine*, pp 297-302.

89. Types of delivery. The law recognises three categories of delivery : actual, constructive and symbolical delivery. The traditional textbook treatment of moveable security, after the recitation of *traditionibus, non nudis pactis* is to have a general discussion of the three types, stating that they apply to the creation of any form of moveable security at common law.¹ This approach is open to question for two reasons. Firstly, delivery is really a matter for general property law and not security law in particular and therefore it should not take up the amount of space it does in accounts of moveable security.² Secondly, it ignores a leading case the ratio

of which is that pledge may only be created by actual delivery.³ The approach taken here will be to analyse the forms of delivery with specific reference to pledge.

1. See, for example, J Lillie, *The Mercantile Law of Scotland*, (6th ed, 1970), pp 88-89 and W M Gloag and R C Henderson, *An Introduction to the Law of Scotland*, (10th ed, 1995), paras 19.11-19.13. E A Marshall in her *Scots Mercantile Law*, (2nd ed, 1992), paras 7.80-7.92 purports to discuss the three forms of delivery with specific regard to pledge. However, most of the cases cited are not in fact true pledge cases and the treatment in reality is the same as that of *Gloag and Henderson* and *Lillie*.

2. Admittedly, many of the cases involve attempts to create securities.

3. *Hamilton v Western Bank of Scotland* (1856) 19 D 152. See below, para 92.

90. Actual delivery. This is where the pledger has natural possession of the property to be pledged and physically delivers it to the pledgee or his agent.¹ Actual delivery is also recognised to take place where the property is locked up and the creditor is given the only key to the enclosure in which it is locked.² The basic concept of actual delivery is not difficult to grasp. However the case law has on occasion conflicted.

In *Johnston v Sprott*,³ the owner and occupier of a mine was lent money by his grieve. He agreed to pledge for this horses, machinery and implements at the mine. However there was no outward change in the possession of these subjects and in the words of the successful argument "for aught the lieges could discover Johnston [the grieve] continued to possess as servant."⁴ The court in what Hume described as a "wholesome judgment"⁵ thus held there was no valid pledge.

Contrast *Moore v Gledden*.⁶ There, a building contract provided that "all plant brought or left on or near the site of the works contracted for should . . . be held to be the property of and belong to the [railway company]".⁷ The purpose of this provision was to ensure that the contract was duly performed. The plant was duly brought on to the company's property. It later came up for decision whether the company had a valid security. It was held by seven judges (an eighth judge dissenting) that a real right of pledge had been constituted in favour of the company.⁸ This case is a problematic one and difficult to reconcile with *Johnston*.

Although the plant was brought on to the company's ground the contractor continued to use it to perform the contract. Although the difference with *Johnston* is that there was no movement there at all, the truth is that the very nature of a contractor's job is to take his plant around with them. His tools, machinery, wagons and so forth exist for a specific purpose : they are there to be taken to his jobs. Just because they are situated at the site of his present job does not mean he has ceased to possess them : in the words of the dissenting judge, Lord Kinloch : "Possession of moveables is an individual and personal, not a territorial thing."⁹

The two reasoned judgements of the majority place too much emphasis on the terms of the building contract.¹⁰ They are in reality giving effect, in Lord Kinloch's words to a "paper possession"¹¹ and when Lord Neaves states that "[p]action cannot supply the place of possession",¹² it is difficult to be convinced that he puts this principle into practice in his decision.

1. See A J Sim, *SME*, vol 20, para 10.

2. *West Lothian Oil Co Liquidator v Mair* (1892) 20 R 64.

3. (1814) Hume 448.

4. *Ibid*, p 450.

5. At 450.

6. (1869) 7 M 1016.

7. At 1017.

8. Cf the modern English case of *Re Cosslett Contractors Ltd* [1996] 1 BCLC 407, where a similarly worded contract was held to create an equitable charge. I am grateful to Mr W James Wolffe for drawing this case to my attention.

9. At 1024.

10. See Lord Neaves at 1021 and Lord Cowan at 1025-1026.

11. At 1024.

12. At 1021.

91. Other forms of delivery. These will be summarised here. Constructive delivery is where the subject matter is not physically delivered. The main form is where the

property is in the custody of a third party such as a warehouseman and the owner intimates to the third party, usually via a delivery order, that it is now to be held on behalf of his transferee.¹ It is essential that the custodian is informed; otherwise there is no delivery.²

An examination of most textbook treatments of moveable security suggests that the form of constructive delivery outlined is the only form.³ There are in fact three other forms. *Traditio brevi manu* is where the property is already in the possession of the would-be pledgee, for example under a contract of hire.⁴ Delivery is effected by a change in his *animus* as to the nature of his detention. *Traditio longa manu* involves possession being transferred by the pointing out of the property to the transferee so he may deal with it at his pleasure.⁵ *Constitutum possessorum* is where the transferor undertakes to detain the property on behalf of the transferee but retains physical control of it throughout the transaction.⁶

Symbolical delivery is effected by the actual delivery of a thing which the law regards as amounting to a symbol of the goods.⁷ For our purposes, it means the transfer of a bill of lading.

1. W M Gloag and R C Henderson, *The Law of Scotland*, (10th ed, 1995), para 19.13; D L Carey Miller, *Corporal Moveables in Scots Law*, (1991), para 11.07; W M Gordon, *SME*, vol 18, para 620.

2. *Inglis v Robertson & Baxter* (1898) 25 R (HL) 70.

3. For example, *Gloag and Henderson*, para 19.13.

4. W M Gordon, *SME*, vol 18, para 622; G Lubbe, *LAWSA*, vol 17, para 491.

5. *Ibid.*

6. W M Gordon, *SME*, vol 18, para 623; *Milligan v Ross* 1994 SCLR 430.

7. *Gloag and Henderson*, para 19.12; *Carey Miller*, paras 11.08-11.09; W M Gordon, *SME*, vol 18, para 621.

92. The apparent monopoly of actual delivery. In *Hamilton v Western Bank of Scotland*,¹ cases of brandy belonging to the debtor were in a warehouse. The bank wished security over them. A delivery order for the cases was executed in favour of the bank and delivered to it. Intimation was made to the storekeeper. The debtor

later became bankrupt. The bank sought to realise its security. There was a dispute over whether it covered an additional loan made by the bank. In the Outer House, Lord Handyside regarded the transaction as pledge so therefore the further advance was not secured.² After an amendment of the pleadings, the First Division held in contrast that the transaction was one of *ex facie* absolute transfer and therefore that the additional loan was secured.³

The principal reason behind the Inner House decision is given by the judges. It is that pledge may only be constituted by actual delivery.⁴ Constructive delivery is not allowed. Neither is symbolical delivery. These are only permitted for transfer of ownership. The fact that the parties intended to pledge the property is irrelevant. Given, as has already been stated, that delivery is a general property law notion relevant to the creation of all real rights, this reasoning is jurally illogical. *Hamilton* has therefore been subject to criticism over the years; beginning with Lord McLaren; moving through Gloag and Irvine, and Graham Stewart; and up to the present day with Rodger and Gertton.⁴ Rather than reiterating all their arguments here, an attempt to express some fresh points will be made.

We begin with the justification of the decision, given by Lord President McNeill :

"By presenting the delivery order to the storekeepers . . . the defender obtained what has not been unfrequently called constructive delivery . . . But it is not a thing which has been recognised by any authority I know, as coming in place of that custody, which is of the essence of the contract of pledge - the value of which consists in having the custody without the property of the goods. Nor is there in the dicta of our writers any encouragement to go farther in that direction."⁵

Here is some authority which should have been drawn to his attention. Stair, in writing about delivery says :

"yet *utiliter* and *equivalenter*, possession lawfully attained by virtue of the disposition, although not delivered by the disponer, will be sufficient; as if the disponer were not in possession himself, and so cannot deliver it; yet the acquirer may recover it from the detainer".⁶

Then he makes clear that this statement is not confined to transfer of ownership : "Possession is requisite, not only to the conveyance of the property of moveable goods, but also of . . . pledges".⁷ Stair clearly has no objection to pledge being constituted by constructive delivery.

In terms of earlier case law, there is nothing to support *Hamilton* : in fact quite the opposite. In *Bogle v Dunmore and Co*⁸ the court recognised that a bill of lading represented possession and not title to goods. The clear implication is that the pledge of such a document title is possible. In *Colquhoun v Findlay, Duff and Co*⁹ goods were in a warehouse. Their owner granted a delivery order in favour of his creditor which was intimated to the storekeeper. It was held on the particular facts in question that the nature of the transaction was an absolute transfer in security. However, in the references made to pledge both by pursuer, defender and the court, nowhere is it suggested that a pledge by constructive delivery was incompetent.

However the bluntest denial of the principle expressed in *Hamilton* comes in *Auld v Hall and Co*.¹⁰ There, goods once more were in a warehouse. The owner purported to sell them to a third party. However, no intimation was made to the storekeeper. The owner became bankrupt. The sale was held invalid. Here is what Lord President Hope had to say :

"This case, although new in some respects, must be determined according to principles long established in law. Moveables cannot be effectually transferred or pledged without delivery, if in the possession of the party transferring or pledging, or if in the possession of a third party, without intimation to the custodier."¹¹

Although the comments on pledge are obiter they are unequivocal. The authority of *Hamilton* is gravely weakened. This is particularly true, because Lord Deas, one of the judges in *Hamilton*, in a later judgement expressly approved Lord President Hope's statement.¹² The conclusion is simply that *Hamilton* is not good law.

1. (1856) 19 D 152.

2. At 155-158.

3. At 158-167.

4. Bell, *Commentaries*, (7th ed, ed Lord McLaren, 1870), II.21 (n 1); Gloag and Irvine, pp 256-257; J Graham Stewart, *The Law of Diligence*, p 155 n 3; Lord Rodger, "Pledge of Bills of Lading in Scots Law", 1971 JR 193; G L Gretton, "Pledge, Bills of Lading, Trusts and Property Law", 1990 JR 23.

5. (1856) 19 D 152, 159.

6. *Stair*, III.2.5. See D L Carey Miller in D L Carey Miller and D W Meyers (eds), *Comparative and Historical Essays in Scots Law : A Tribute to Professor Sir Thomas Smith QC*, (1992), p 13, at pp 21-23.

7. *Stair*, III.2.6.

8. (1787) Mor 14216.

9. 15 Nov 1816, FC.

10. 12 June 1811, FC.

11. *Ibid*.

12. In *Wyper v Harveys* (1861) 23 D 606, at 629-630.

93. Pledge by constructive delivery. It is submitted that pledge by intimation to a third party custodian is competent under Scots law. As well as what has been said in the preceding paragraph, reference may be made to the decision of the Whole Court in *Robertson & Baxter v Inglis*.¹ There, an attempt was made to utilise the Factors Acts to evade the requirement of intimation to the custodian which the common law demands for constructive delivery.² The case actually involved an assignation in security. However the judges felt happy to discuss constructive delivery as regards pledge.³ A number of them believed that the common law sanctioned pledge by constructive delivery. Here is Lord Moncreiff :

"Pledge being a real right requires for its completion delivery of the goods pledged or equivalents for delivery; and where the goods are in possession of a third party, the mere transfer to the pledgee of a delivery-order or warrant is not of itself sufficient, without intimation to the custodian to complete the pledgee's right."⁴

Further, the judges who pronounced that actual delivery was a necessity seemed to hide behind the case of *Hamilton*.⁵ Acceptance of delivery by intimation to a third party custodian brings Scots law into line with other systems.⁶

It is suggested that pledge by *traditio brevi manu* is also permissible. No authority can be offered to support this conclusion, other than that which is comparative.⁷ However it seems illogical that where the intended pledgee already has possession, for example under a contract of hire, that he must hand it back to its owner and then have it redelivered to him to effect a valid pledge. A change in *animus* is surely enough.

Pledge by either *traditio longa manu* or *constitutum possessorium* both have very doubtful validity. In each of these there is lacking the publicity which the law of security generally demands to protect third parties. However, Professor Gordon for one would not object to a pledge being created in these ways.⁸ The present writer has yet to be convinced.

1. (1897) 24 R 758.

2. Factors Act 1889, (52 & 53 Vict c 45), ss 1(1), 3.

3. Basically, because the definition of pledge in the Factors Act is wider than the common law meaning : 1889 Act, s 1(5).

4. At 817. See also Lord McLaren at 777 (Lord President and Lord Adam concurring), Lord Kinnear at 780; Lord Stormonth Darling at 789.

5. See Lord Kincairney at 785.

6. See G Lubbe, *LAWSA*, vol 17, para 491; BGB, art 1205(2). Note too the American Law Institute, *Restatement of the Law of Security*, (1941), s 8; Uniform Commercial Code, s 9-305, set out and discussed in J J White and R S Summers, *Uniform Commercial Code*, (4th ed, 1995), vol 4, para 31-12.

7. See Lubbe, *ibid*; American Law Institute, *Restatement of the Law of Security*, (1941), s 7; BGB, art 1205(1); Civil Code of Louisiana, art 3152.

8. See his commentary to *Milligan v Ross* 1994 SCLR 430, 435-436.

94. Pledge by symbolical delivery. The story of pledging bills of lading has been well set out by Lord Rodger.¹ It begins of course with *Hamilton*.² Then comes the unequivocal view of the House of Lords in an English case, *Sewell v Burdick* that a bill of lading symbolises the possession of goods and not title thereto.³ Possession and title may coincide but they do not have to. Consequently, bills of lading may be validly pledged in English law.

The most important Scottish development is the case of *North Western Bank v Poynter, Sons and Macdonalds*.⁴ There, an importer had expressly agreed to pledge a bill of lading to his bank. It was duly delivered, but later handed back so that the merchant could sell the goods on the bank's behalf the bank having a power of sale under the contract of pledge. After an arrestment of the price of the goods, there was a dispute as to whether the right of pledge had been lost by redelivery to the pledger. Now if *Hamilton* was to be followed the court would have dismissed all the arguments based on pledge, for there was no actual delivery of the goods. However, in both the Court of Session and the House of Lords there was no reference to *Hamilton*. The judges were happy to treat the transaction as one of pledge and on the facts held that the real right had not been lost by redelivery. Consequently, *Poynter sub silentio* overrules *Hamilton*.⁵

However in a later case, *Hayman v McLintock*,⁶ *Hamilton* was once again upheld as governing the situation where pledge is attempted of a bill of lading. The judgements in *Hayman* upon the matter are difficult to comprehend and the decision has been cogently attacked by Professor Gretton.⁷

One further argument has produced itself since Professor Gretton wrote. In England, one result of *Sewell* was to hold that a pledgee of a bill of lading did not have the statutory rights that one having *dominium* had through his detention of the same. This was felt to be unsatisfactory and the law was amended by the Carriage of Goods By Sea Act 1924.⁸ The relevant provisions therein apply to Scotland also. This means that Parliament must regard a pledge of a bill of lading in Scotland as valid, for if *Hamilton* was still good law there would be no need for these provisions to apply north of the border.

1. Lord Rodger, "Pledge of Bills of Lading in Scots Law" 1971 JR 193.

2. (1856) 19 D 152.

3. (1884) LR 10 App Cas 74.

4. (1894) 22 R (HL) 1.

5. See Rodger and G L Gretton, "Pledge, Bills of Lading, Trusts and Property Law" 1990 JR 23, at p 31. Pledging of bills of lading is competent in other jurisdictions. See, for example, Lubbe, *LAWSA*, vol 17, para 419 and the Civil Code of Quebec, art 2708.

6. 1907 SC 936.

7. *Gretton*, *op cit* n 5, at p 25.

8. Carriage of Goods By Sea Act 1992 (c 50), s 2.

95. Limitation of *Hamilton* by the Factors Acts. By the Factors Act 1889 a mercantile agent may validly pledge goods in his possession.¹ It is further provided that : "A pledge of the documents of titles to goods shall be deemed to be a pledge of the goods."² "Document of title" includes any bill of lading, dock warrant, warehouse-keeper's certificate, and warrant or order for the delivery of goods.³ The natural reading of these provisions is that when it comes to a mercantile agent *Hamilton* has no application. Also seemingly irrelevant are the normal rules on constructive delivery. In *Robertson & Baxter and Inglis*⁴ the Whole Court employed all manner of means to avoid this conclusion. The House of Lords got round the problem by stating that on the facts the provisions did not apply, as the purported pledge was by the owner of the goods and not a mercantile agent.⁵ However the Lord Chancellor seemed willing to read the provisions literally were the right factual situation to come up.⁶ At any rate, these provisions impinge upon *Hamilton*.

1. Factors Act 1889 (c 45), s 2.

2. *Ibid*, s 3.

3. *Ibid*, s 1(4).

4. (1897) 24 R 758.

5. *Inglis v Robertson & Baxter* (1898) 25 R (HL) 70. The case actually involved an assignation; however the definition of pledge in the 1889 Act s 1(5) includes this.

6. At 71. See A J Sim, *SME*, vol 20, para 18.

11. RIGHTS AND DUTIES OF THE PARTIES

96. Redemption. The basic right of the pledger is to have the pledged property returned to him upon his discharge of the obligation secured. The basic duty of the pledgee is to effect that return.¹ This much is self-explanatory and appreciated from the earliest days of our law.²

The pledgee must restore the subject matter of the pledge in pristine condition, subject to normal wear and tear.³ In Lord Dunedin's words : "who ever heard of a person who had a pledge being allowed to give that pledge back again in a different condition from that in which he got it ?"⁴ Unless there is an agreement providing otherwise, the pledgee must return the property which was actually pledged and not some equivalent article.⁵

1. *Erskine*, III.1.33; Bell, *Principles*, s 206. See D.44.7.1.6; BGB, art 1223; Spanish Civil Code, art 1871; G Lubbe, *LAWSA*, vol 17, para 494.

2. *Douglas v Menzeis* (1569) Balfour 196.

3. W M Gloag, *Encyclopaedia*, vol 11, para 767; A J Sim, *SME*, vol 20, para 24.

4. *Johnston v Irons* 1909 SC 305, 317.

5. *Op cit* n 3; *Crerar v Bank of Scotland* 1921 SC 736, 1922 SC (HL) 137. (The case actually involves an assignation of shares. However, it illustrates a general principle).

97. Use of the property. It is an important question whether the pledgee may make use of the pledged property. From the earliest days, when people were the subjects of pledge, the answer has been in the negative. Pufendorf tells us that in the kingdom of Pegu wives and children might be pledged.¹ However if the pledgee slept with a pledged wife or daughter, the loan was forfeited and the wife or daughter had to be returned. He does not tell us what happened if the pledgee interfered with a son.

In Roman law, making use of a pledged subject was clearly prohibited.² Ulpian writes that where a slave girl has been pledged and the pledgee puts her to prostitution or engages her in some other disreputable conduct, the *pignus* of her is discharged on the spot.³ In fact usage of the subject matter of a pledge in Roman law amounted to theft.⁴ The early Scots law did not have such a severe rule. It was simply a rule that the pledgee :

"may on na wayis use nor handle the samin, quhairby it may be maid worse then it was the time that it was gevin him in wad".⁵

Hence usage was permitted if it was clear that the pledged property would remain in its pristine condition. And of course by that time it was clear that people could not be pledged in the same manner as inanimate objects.

With the Reception of Roman law into Scotland the prohibition on use here became an absolute one.⁶ However, the pledgee in breach of this rule is not regarded as being a thief. Further and importantly, the right of pledge is not extinguished by the pledgee using the property.⁷ Instead he is liable in damages. The quantum is the cost to hire the property for the period it was used.⁸ Therefore it would seem that the theoretical basis of the claim is recompense for unauthorised use, the pledgee being liable in *quantum lucratus*.⁹

There is a general problem here. In the words of Lord Stott, the net effect of the rule is "to give carte blanche to the pledgee to enjoy the use of items deposited with him as security . . . subject only to . . . some sort of *post factum* accounting to the owner."¹⁰ The view is reinforced by the conclusion of the sheriff in *Kirkwood and Pattison v Brown*.¹¹ He held that where a horse was pledged to coal merchants it might be used to do work for the firm, provided that the value of the service performed was paid to the pledger. However, Lord Stott would seem to have overlooked the fact that under the traditional rule, the pledger would be able to get an interdict against the pledgee if he wished to stop the use. Therefore, the correct decision in *Kirkwood* should have been a reassertion of the absolute prohibition, followed by an observation that no interlocutory action had been taken and then as before an award of the relevant hire cost to the pledger.

An exception to the general rule is admitted where use is necessary to maintain the value of the pledged property.¹² The cardinal example is the impignorated animal. A horse which is not exercised will become very unhealthy. However the level of use must be no more than is required for this purpose. Deploying the animal to deliver coal as in *Kirkwood* is not permissible. Nor is riding the horse in the 3.20 at Musselburgh. At the other extreme there is *obiter* authority to the effect that if a pledged horse is not exercised the pledgee will be liable to the pledger in damages for the deterioration in the animal's health caused thereby.¹³

There is nothing to stop the pledger and pledgee agreeing that the latter is allowed to use the pledged property. Such an arrangement is termed a *pactum antichresis* and was common in Roman law.¹⁴ The perceived benefit gained by the pledgee is normally set off against interest due on the debt. Further any surplus could be agreed to be set off against the principal sum. The case of *Moore v Gledden*¹⁵ would appear to be an example of an antichretic pledge. Plant was pledged by a contractor to a railway company. However the contractor continued to use the plant. He could only do this as the company's agent, hence the pledge was antichretic.

On the matter of the use of pledged property, South African law and most civilian systems take the same approach as we do.¹⁶ However, English and Scots law part company due to the civilianism of the latter. The English rules were set out by Chief Justice Holt in the landmark decision of *Coggs v Bernard*.¹⁷ The principal one is that the pledgee may use the property if it will not be the worse for it. Therefore, jewellery may be used but clothes may not.¹⁸ A second rule is that if the pledgee must incur cost in respect of the upkeep of the property, then he has a specific right to use it in recompense for this. For example, horses require to be fed and a pledgee will expend money in doing this. In return he may ride the horse. The difference between the English and Scots law can be seen; it is unfortunate that Gloag and Irvine adopt the wrong set of rules.¹⁹

1. S Pufendorf, *De Jure Naturae et Gentium*, V.10.13.

2. Thomas, p 330.

3. D.13.7.24.3.

4. D.47.2.55.pr.

5. Balfour, *Practicks*, p 195.

6. Bell, *Principles*, s 206.

7. Hume, *Lectures*, IV,2-3; *Wolifson v Harrison* 1977 SC 384.

8. Hume, *ibid*.

9. W M Gloag, *Contract*, (2nd ed, 1929), p 329.

10. *Wolifson v Harrison* 1977 SC 384, 392.

11. (1877) 1 Guth Sh Cas 395.

12. Hume, *op cit*, n 7.

13. *Kirkwood and Pattison v Brown* (1877) 1 Guth Sh Cas 395, 397 per Sheriff Fraser.

14. *Bankton*, I.17.3. Indeed, there might have been such an arrangement implied in *Kirkwood*, for a harness was handed to the pledgee along with the horse.

15. (1869) 7 M 1016.

16. G Lubbe, *LAWSA*, vol 17, para 494; BGB, art 1213(1); Civil Code of Spain, art 1870; Civil Code of Quebec, art 2736; Civil Code of Louisiana, art 3166. The American Law Institute, *Restatement of the Law of Security*, (1941), s 22 also prohibits use without the authorisation of the pledger.

17. (1703) 2 Ld Raym 909; 92 ER 107. See also *Anon* (1693) 2 Salk 522; G W Paton, *Bailment*, pp 369-370.

18. *Ibid*.

19. *Gloag and Irvine*, p 213; A J Sim, *SME*, vol 20, para 24.

98. Fruits. In general the pledgee is not entitled to appropriate the fruits of the pledged item for his own use.¹ An exception is admitted in the case of fruits which require to be extracted for the welfare of the property.² Cattle must be milked to keep them healthy. Similarly sheep require to be shorn every so often. The rule is that the pledgee may keep such natural fruits unless there is an agreement to the contrary. They are set off against the debt owed by the pledger. A similar rule applies in England.³ According to Hume they may be set off either against the cost incurred in caring for the animal or the actual debt itself.⁴ It is submitted, however, that the best way to set them off is firstly against the expenses incurred by the pledgee, secondly against any interest due and then thirdly against the principal debt.⁵ It is possible to have a conventional *pactum antichresis* in respect of the fruits.⁶ These were common in Roman practice.⁷

1. *Bankton*, I.17.3; Hume, *Lectures*, IV,2-4. See also the BGB, art 1213(1) and the Civil Code of Louisiana, art 3168.

2. Hume, *Lectures*, IV,2-4. See too the BGB, art 1213(2).

3. *Mores v Conham* (1610) Owen 123; 74 ER 946; *Coggs v Bernard* (1703) 2 Ld Raym 909; 92 ER 107.

4. Hume, *op cit* n 2, at p 4; Bell, *Principles*, s 1364.

5. See also *Bankton*, I.17.3.

6. *Stair*, I.13.11.

7. *Bankton*, I.17.3.

99. Expense of looking after pledged property. The pledgee is entitled to compensation in respect of money laid out upon the care of the pledged subject.¹ As has been seen, there are special rules governing where the property produces natural fruits, so that these are set off against the cost of care.² Erskine, however, appears to express the general rule more widely than just has been stated :

"The creditor is entitled to an action against the debtor for the recovery of the expenses which he has disbursed profitably on the subject while in his hands."³

A similar passage appears in Mackenzie's *Institutions*.⁴ The literal meaning - namely that the cost of improvements is recoverable - is very difficult to reconcile with a rule of unjustified enrichment, in particular recompense. That is that only *bona fide* possessors are entitled to compensation for improvements.⁵ Grotius is certainly clear that in Roman-Dutch law the pledgee can only recover necessary expenses.⁶ This appears to be the rule in most systems.⁷

1. *Erskine*, III.1.33. The rule comes from Roman law : see D.13.7.8pr and R Zimmermann, *The Law of Obligations*, (1990), p 227.

2. See the preceding paragraph.

3. *Erskine*, III.1.33.

4. Sir G Mackenzie, *Institutions of the Law of Scotland*, III.1.

5. See W M Gloag, *Contract*, (2nd ed, 1929), p 324.

6. Grotius, *Inleidinge*, III.8.7. See too G Lubbe, *LAWSA*, para 494.

7. See the BGB, art 1216; Civil Code of Spain, art 1867; Civil Code of Quebec, art 2740. In terms of the Civil Code of Louisiana, art 3167, however, the pledgee may recover "useful and necessary expenses" made for the preservation of the property. The American Law Institute, *Restatement of the Law of Security*, (1941), s 25 allows recovery of "reasonable expenses".

100. Duty of care of pledgee. The ownership of the impignorated property remains with the pledger. Consequently, the risk remains with him as well.¹ Thus if

the pledged sheep get struck by lightning and are killed, the pledger must suffer the loss while remaining liable upon the obligation for which they were pledged as security. However, the pledgee is expected to exercise a certain level of care in respect of the property and if he fails in his duty he will become liable for the loss.² In a very early case, we get an idea of the standard care which the pledgee must exercise :

"Gif ony man lendis to ane uther ane sowme of money, and ressavis a wad thairfoir, to be kept be him, until his money be restorit to him, and it happin the samin wad to be stollin be theivis, robberis or brigantis, or to be tint and lost, be ony chance, force or violence, without any fault or negligence of the keipar, to the quhik he could not resist, he sould not be compellit or haldin to mak restitution thairfo; and zit nevertheless he hes gude actioun for repetitioun of his money, for the quhilk the samin pledge was gevin."³

The Reception of Roman law saw the adoption of the civilian rules on the matter,⁴ but in essence there is no real difference. Stair, wrote that the pledgee must exercise such diligence as prudent men used in their affairs.⁵ The pledgee was not strictly liable. By Bell's time, this had come to be expressed simply that the pledgee must bestow ordinary care.⁶ In the only modern case on the matter a pledged watch had been stolen from a pawnbroker's locked safe by a housebreaker.⁷ The pledger sought to recover his loss from the broker. However it was held that having placed the watch in the safe the broker could neither be regarded as negligent nor at fault and he was therefore not liable to the pawnor.

In England, Coke wrote that the pledgee "ought to keepe [the pledged property] no otherwise than his owne".⁸ This mortified Sir William Jones, for of course we all look after our own property to greater or lesser extents than others.⁹ He seems to suggest that theft of the property, as opposed to robbery, indicates a lack of care in the pledgee.¹⁰ However this will probably depend on the facts in question, as Chief Justice Holt's opinion in *Coggs v Bernard*¹¹ that the pledgee must exercise ordinary care is accepted as being a correct statement of the law.¹² Like Scots law, the root of this is the law of Rome.

In English law, the pledgee becomes strictly liable if he retains the property after payment for the debt is tendered.¹³ There is analogous Scottish authority for the second of these propositions in a case involving pawning of sheep.¹⁴

1. Bell, *Principles*, s 206; Hume, *Lectures*, IV,4.

2. *Elliot v Conway* (1915) 31 Sh Ct Rep 79.

3. *Foulis v Cognerlie* (1566) Balfour 195.

4. On the Roman law, see R Zimmermann, *The Law of Obligations*, (1990), pp 225-227.

5. *Stair*, I.13.12. See also *Erskine*, III.1.33. In Spain today, the pledgee must exercise "the diligence of a prudent administrator" : Civil Code of Spain, art 1867.

6. Bell, *Principles*, s 206. The American Law Institute, *Restatement of the Law of Security*, (1941), s 17, imposes a "duty of reasonable care". Cf the BGB, art 1215.

7. *Elliot v Conway* (1915) 31 Sh Ct Rep 79.

8. Coke, *Institutes*, I,89a.

9. Sir William Jones, *An Essay on the Law of Bailments*, p 75.

10. *Ibid*, pp 75-83; G W Paton, *Bailment in the Common Law*, (1952), p 360.

11. (1703) 2 Ld Raym 909; 92 ER 107.

12. N E Palmer, *Bailment*, (2nd ed, 1991), p 1405.

13. *Coggs v Bernard*, *op cit*, n 10.

14. *Fraser v Smith* (1899) 1 F 487.

12. MAINTAINING POSSESSION

101. General. The real right which the pledgee enjoys in the pledged property depends on his continuing possession.¹ The rationale is that third parties should be given notice that the property is burdened by a security : *mobilia non habent sequelam ex causa hypothecae*.² Thus if the pledgee gives the impignorated object away to a third party his real right is extinguished.³ The same thing generally happens if he returns it to the pledgor.⁴ However, the law has admitted some very limited exceptions, where a pledgee who has been in natural possession is permitted to maintain possession civilly through another.

1. *Erskine*, III.1.33; Bell, *Commentaries*, II.22; Bell, *Principles*, ss 205 and 1364; Hume, *Lectures*, IV.3; *Hunter v Slack* (1860) 22 D 1166; *Tod and Son v Merchant Banking Co* (1883) 10 R 1009.

2. *Ibid*; *Bankton*, I.3.

3. *Wolifson v Harrison* 1977 SC 384.

4. See authorities cited in n 1 and W M Gloag, *Encyclopaedia*, vol 11, para 771.

102. Release for necessary operations. The law allows the pledgee temporarily to release the subject of the pledge where it requires to be repaired.¹ Civil possession through the repairer is sufficient here to maintain the real right of pledge.

1. Bell, *Commentaries*, II.22. See too G Lubbe, *LAWSA*, vol 17, para 499 and the Civil Code of Quebec, art 2704 and the American Law Institute, *Restatement of the Law of Security*, (1941), s 11.

103. Redelivery to pledger for purpose of sale. It would seem that where the pledgee is invested with a power of sale, he may return the pledged property to the pledger to act as his agent in carrying out that sale. The authority for this proposition is the decision of the House of Lords in *North Western Bank v Poynter, Sons and Macdonalds*.¹ There, an importer had been advanced money by the bank. In return he agreed to pledge bills of lading to it. These were duly delivered. Eight days later the bills were returned to the importer with the instruction that he was to sell the goods which they represented on the bank's behalf. The importer then sold the goods for which he received part-payment. A third party then arrested the balance in the buyer's hands. It was held, by the House of Lords, reversing the Second Division that by giving up possession of the bills in this manner the bank had retained its right of pledge and was therefore preferred to the arrester.²

A number of points must be made. Firstly, the court states that the laws of Scotland and England are the same upon the matter and certainly there is later English authority following it.³ Secondly, the court is keen to help commerce. The Lord Chancellor, referring to the Inner House judges' opinion that a pledged object may not be returned for any purpose to the pledger without the right of pledge being extinguished says :

"If the rule exists, it is one which runs counter to every-day commercial practice, and I am satisfied, to every-day commercial understanding of business transactions."⁴

Thirdly, on the basis of *Hamilton v Western Bank*,⁵ the case is not one of pledge at all. This is certainly Professor Gow's opinion.⁶ However, for reasons advanced elsewhere as well as the express references to *pledge* which pervaded the Court of Session and House of Lords judgements this argument may be dismissed.⁷

Fourthly, an important point is the exact manner in which the bills of lading were returned to the importer. They were redelivered under what has since become known as a trust receipt.⁸ In it the bank stated : "we transfer to you as trustees for us the bills of lading".⁹ The natural interpretation of this, as Professor Gretton points out, is that the case is in reality one of commercial trust.¹⁰ Upon redelivery the pledge is extinguished. However the pledger holds the property and its proceeds upon sale in trust for the former pledgee. On the wording of the documentation in *Poynter* this approach has its attractions. However, it runs contrary to the language of the House of Lords, as well as a large mass of later English authority.¹¹ Given the fact that the law of England and Scotland is said to be the same on this matter the latter is very persuasive.¹² Here is Ellinger:

"The trust receipt enables the bank to retain an adequate security against the customer's insolvency. The release of the bill of lading to him . . . does not destroy the pledge. . . The bank is, futher, protected in respect of the proceeds. If the customer fails after the sale of the goods, the bank has priority over the amount realised."¹³

The view that the pledge remains constituted over the goods and then a trust attaches over the proceeds must be accepted as an accurate statement of the law. However, there is the difficulty here that the trust is a truster-trustee trust and the use of such trusts was not finally approved by the House of Lords till three quarters of a century after *Poynter*.¹⁴ Incidentally, this problem applies *a fortiori* to Professor Gretton's interpretation of the case, where both the goods and the proceeds would be held under such a trust. There is the further difficulty that the trust is a commercial

one and that on other occasions the courts have frowned upon such quasi-securities.¹⁵

The problem with the commercial trust is that it allows security without publicity. It is *Poynter's* acquiescence with this state of affairs which concerns Lord Rodger the most.¹⁶ The main practical difficulty is that the pledger might repledge the goods to a *bona fide* third party. When the matter came up in England, the Factors Acts were used by the courts to protect the third party, leaving the pledgee to bear the loss.¹⁷ The advice to the pledgee in the light of this is to get the pledger to store the goods in a warehouse under the pledgee's name so that his permission is required before any transaction is carried out.¹⁸

Despite its policy objections the trust receipt has become too entrenched into banking practice for *Poynter* to be overruled. Even in Louisiana a similar rule applies.¹⁹ The best way forward would appear to be that suggested by Professor Diamond. Pledges should require to be registered where the secured party ceases to have possession for whatever purpose, however temporary.²⁰

1. (1894) 22 R (HL) 1.

2. The Inner House judgement is reported at (1894) 21 R 515. See generally, Lord Rodger, "Pledge of Bills of Lading in Scots Law" 1971 JR 193.

3. Per the Lord Chancellor (Herschell) at 6 and Lord Watson at 12.

4. At 7-8.

5. (1856) 19 D 152. See above, para 92.

6. J J Gow, *The Mercantile and Industrial Law of Scotland*, (1964), p 278, n 68. The view is shared by Lord Maxwell in *Wolifson v Harrison* 1974 SLT (Notes) 55, 56-57.

7. Above, paras 92-94.

8. See G L Gretton, "Pledge, Bills of Lading, Trusts and Property Law", 1990 JR 23, 31-32; *Chitty on Contracts*, (27th ed, 1994), vol 2, paras 33.400-33.402.

9. (1894) 22 R (HL) 1, at 5.

10. Gretton, *ibid*, at 32-33.

11. *Re David Allester Ltd* [1922] 2 Ch 211; *Lloyds Bank Ltd v Bank of America National Trust and Savings Association* [1938] 2 KB 147; G W Paton, *Bailment in the Common Law*, (1952), p 357; Chitty, para 33.400; *Paget's Law of Banking*, (11th ed, 1996), pp 563-564.

12. *Op cit*, n 3.

13. E P Ellinger, *Modern Banking Law*, (1987), pp 572-573. See also L D Crerar, *The Law of Banking in Scotland*, (1997), p 279.

14. *Allan's Trs v Lord Advocate* 1971 SC (HL) 45.

15. In particular in *Clark Taylor & Co v Quality Site Development (Edinburgh) Ltd* 1981 SLT 308. See generally G L Gretton, "Using Trusts as Commercial Securities" 1988 JLSS 53.

16. *Rodger, op cit* at 207ff.

17. *Lloyds Bank Ltd v Bank of America National Trust and Savings Association* [1938] 2 KB 147.

18. *Ellinger*, p 573.

19. See R Slovenko, "Of Pledge", (1958) 33 Tul LR 59, at pp 75-87 and V S Meiners, "Formal Requirements of Pledge under Louisiana Civil Code Article 3158 and Related Articles" (1987) 48 La LR 129, 138.

20. *Review of Security Interests in Property*, (DTI, 1989), para 11.5.7.

13. THE REAL RIGHT : ENFORCEMENT AND EXTINCTION

104. General. A pledgee has a real right in the moveable property which is the subject matter of the pledge.¹ The debtor retains ownership of the property.² The pledgee's subordinate real right covers the entire property pledged including its fruits.³ Pledge is a type of real right in security and as such the pledgee is entitled to enforce his right in the thing pledged against the world. If the pledger transfers his title to the property, the right of pledge remains good against the singular successor.⁴ Further, in the event of the pledger's insolvency the pledge will remain good as against the trustee in sequestration or liquidator.⁵ A pledge will be good against a receiver if the real right was constituted before the creation of the floating charge.⁶ If created after that but before receivership its effect will be governed by the document creating the floating charge.⁷ Insolvency processes apart, the real right of pledge will be effective against any diligence executed posterior to its creation,⁸ in particular a poinding or an arrestment.

The pledgee has possession of the property and consequently he will have a good action against anyone who wrongfully dispossesses him during the currency of this right.⁹ It is suggested that this claim will be based upon spuilzie.¹⁰

In England it is said that the pledgee has a "special property",¹¹ or at least a "special interest"¹² in the pledged property. According to Gloag and Irvine, the first of these phrases, "though unknown to Scotch law, would appear conveniently to represent the right, more than possession, though less than property, with which the pledgee is invested in Scotland."¹³ This statement shows the malaise which Scots property law was in at the time. It is submitted that the term *real right* is eminently preferable to that which the learned authors suggest.

1. *Stair*, I.13.11.

2. *Bankton*, I.17.1; *Erskine*, III.1.33; Bell, *Principles*, s 1364. It is therefore not a good idea to define pledge as being the situation where property is "transferred in security", although the transfer contemplated is that of possession. D M Walker, *Principles of the Law of Scotland*, (4th ed, 1989), vol III, p 394 is culpable of this.

3. D.20.1.13.pr; J Story, *Bailments*, (1829), s 292; American Law Institute, *Restatement of the Law of Security*, (1941), s 3. There is analogous Scottish authority concerning the landlord's hypothec : *Lamb v Grant* (1874) 11 SLR 672.

4. Hume, *Lectures*, IV.4; *Moore v Gledden* (1869) 7 M 1016.

5. H Goudy, *Bankruptcy*, (3rd ed, 1903), pp 573-575; *Hamilton v Western Bank* (1856) 19 D 152.

6. Insolvency Act 1986 (c 65), s 60(1)(a).

7. See Companies Act 1985 (c 6), s 464.

8. *Bridges v Ewing* (1836) 15 S 8; *North Western Bank v Poynter* (1894) 22 R (HL) 1.

9. Hume, *Lectures*, IV.4.

10. On which see K G C Reid, *SME*, vol 18, paras 161-166 and D L Carey Miller, *Corporal Moveables in Scots Law*, (1991), paras 10.23-10.28.

11. *Donald v Suckling* (1866) LR 1 QB 585.

12. *The Odessa* [1916] 1 AC 145, per Lord Mersey at 158-159.

13. *Gloag and Irvine*, p 200.

105. Enforcing the real right. If the pledger fails to discharge the obligation which the pledge secures, or if he becomes insolvent, the pledgee may enforce his security.¹ In the later Roman law, the pledgee had an automatic right to sell the subject matter of the pledge, unless this was excluded by the contract of pledge.² However, this rule did not find its way into our law. Here is Stair :

"Our custom allows not the creditor to sell the pledge, but he may poid it, or assign his debt, and cause arrest it in his hand, and pursue to make forthcoming."³

The "custom" which does not admit a right to sale in the pledgee is surely Anglo Norman custom, though it apparently recognised forfeiture as the remedy which the court would award.⁴ However, the pledge of Stair's time is clearly a collateral security and the remedy is diligence. This remedy remained in use in the days of Bankton and Erskine, although it was becoming less popular.⁵ In particular if the pledgee chooses to assign the debt to a trustee whom he then gets to arrest the property in his hands, as Erskine points out, he runs the risk that another creditor of the pledger has executed a prior arrestment.⁶ Such an arrestment will prevail, as the pledge has been extinguished due to the property not being in the possession of the owner of the debt.

Instead, by Bankton and Erskine's time the preferred remedy was to apply to the judge-ordinary ie the sheriff for permission to have the property sold at a public sale or roup.⁷ The debtor had to be made a party to the sale. This procedure was still going on in Hume's time, by which point the alternative route of executing diligence had become unknown in practice.⁸ Bell, in discussing the pledgee's remedies, simply writes that a summary application to the sheriff to sell the property must be made.⁹ This remains the law today.¹⁰ Obviously if the sale raises more than the debt due, the surplus is paid to the pledger. Conversely if the whole debt is not discharged by it, the pledgee retains a personal right against the pledger in respect of the shortfall.¹¹ The title obtained by the buyer at the sale is derivative and not original.¹²

1. Bell, *Principles*, s 203.

2. See *Erskine*, III.1.33; R Zimmermann, *The Law of Obligations*, (1990), pp 224-225.

3. *Stair*, I.13.11.

4. See above, para 26.

5. *Bankton*, I.17.4; *Erskine*, III.1.33.

6. *Erskine*, *ibid.*

7. *Op cit*, n 5.

8. Hume, *Lectures*, IV.5.

9. Bell, *Principles*, s 207.

10. See, for example, W A Wilson, *Debt*, (2nd ed, 1991), p 92 and D L Carey Miller, *Corporal Moveables in Scots Law*, (1991), para 11.13. In *Industrial and General Trust* (1890) 27 SLR 991, however, application was made to the Court of Session.

11. *Elliot v Conway* (1915) 31 Sh Ct Rep 79.

12. *Hislop v Anderson* (1919) 35 Sh Ct Rep 116.

106. Express power of sale. It is possible for the parties to the contract of pledge to agree that in the event of the pledger's default the pledgee will have power to sell the property without obtaining judicial authority.¹ As Lord Neaves says :

"Impignoration, with a power of sale, is an intelligible and well-known contract."²

The technical name for this arrangement is *parata executio*.³ The theoretical basis of the agreement must be that the pledgee sells as the pledger's agent, for otherwise the rule *nemo plus* would apply. Where the pledgee is indeed given such an express power of sale, he must give the pledger a specific opportunity to discharge the secured obligation before he goes ahead and exercises his right.⁴

By statute, the right to sale without judicial authority is conferred upon licensed pawnbrokers if the pawn is not redeemed after six months.⁵ The pawner must be given a fortnight's notice of the broker's intention to sell unless the advance was less than £50. Within 21 working days after the sale, the pawner must be furnished with information as to the sale, its proceeds and expenses. If the pawnbroker is challenged, the onus is on him to prove that he used reasonable care to ensure that the true market value was obtained and that the expenses of the sale were

reasonable.⁶ There is Sheriff Court authority holding that a pawnbroker upon sale does not warrant title but merely that the property is the subject matter of an irredeemable pledge and that he was not aware of any defect in title at the time of the sale.⁷ This conflicts with the Sale of Goods Act and is surely wrong.⁸

1. See for example, *North Western Bank v Poynter* (1894) 22 R (HL) 1; *Gloag and Irvine*, p 213 and D L Carey Miller, *Corporeal Moveables in Scots Law*, (1991), para 11.13.

2. *Moore v Gledden* (1869) 7 M 1016, 1020. Cf W M Gordon, "Roman Influence on the Scots Law of Real Security", in R Evans-Jones (ed), *The Civil Law Tradition in Scotland*, (1995), p 157, at pp 168-169.

3. See G Lubbe, *LAWSA*, vol 17, para 497.

4. *Murray of Philiphaugh v Cuninghame* (1668) 1 BS 575.

5. Consumer Credit Act 1974 (c 39), s 121; Consumer Credit (Realisation of Pawn) Regulations 1983 (SI 1983 No 1568).

6. *Ibid.*

7. *Hislop v Anderson* (1919) 35 Sh Ct Rep 116.

8. Sale of Goods Act 1979 (c 54) s 12 (warranty of title). At the time of *Hislop* the relevant statute was the Sale of Goods Act 1893 (c 71).

107. Comparative authority. In South Africa, the remedy at common law for the pledgee remains that of levying execution, that is executing diligence.¹ However, the parties may agree that the pledgee will have a power of sale.² In this case the property must be sold to the highest bidder at a public auction.

Under English law, a pledgee has an implied power of sale.³ If the pledge secures a term loan, then the property may be sold on default at the term.⁴ If the loan is one repayable on demand then the pledgee must give notice to the pledger that he is about to sell.⁵ Ireland has similar rules.⁶

In Germany, the pledgee does not require judicial authority to sell the pledged property. However, the BGB lays down specific rules about how such a sale must be carried out.⁷ In particular, there must be a public auction of which the pledger is given notice.⁸ Analogous rules apply in Holland, where the pledgee must get permission from the president of the district court if he intends to do anything other

than sell at a public auction.⁹ In France, a distinction is made between the civil pledge (*gage civil*) and the commercial pledge (*gage commercial*).¹⁰ In the latter, as the name suggests, the parties involved are transacting in the course of a business and the pledgee is legally authorised to sell. With the civil pledge, the pledgee needs to go to court to obtain the same right. In Spain, the pledgee may sell the property under the supervision of a notary public.¹¹

Given that so many of these countries give the pledgee an inherent power of sale one could be tempted into suggesting that Scots law goes down the same road. However, with the pawnbroking provisions and the fact that a right of sale is in practice universally stipulated for in commercial transactions, such a legislative move would not be worth the effort.

1. G Lubbe, *LAWSA*, vol 17, para 497.

2. *Ibid*, para 495.

3. *Pothonier v Dawson* (1816) Holt NP 383; *The Odessa* [1919] AC 145 at 159 per Lord Mersey.

4. *Re Morritt, ex parte Official Receiver* (1886) 18 QBD 222.

5. *Martin v Reid* (1862) 11 CBNS 730; 142 ER 982. See generally, N E Palmer, *Bailment*, (2nd ed. 1991), pp 1410-1412.

6. M G Dickson, W Rosener and P M Storm (eds), *Security on Movable Property and Receivables in Europe*, (1988), pp 80-81.

7. BGB, arts 1233-1245.

8. *Ibid*, arts 1235-1237.

9. W M Kleijn, J P Jordaans, H B Krans, H D Ploeger and F A Steketee in J Chorus (ed), *Introduction to Dutch Law*, (2nd ed. 1993), p 86.

10. *Dickson, Rosener and Storm*, pp 38-41.

11. Civil Code of Spain, art 1872.

108. Forfeiture of pledged property. As we have seen, in its earliest days pledge was not a collateral security but one in which the property subject to the security was forfeited to the creditor if the obligation secured was not discharged.¹ This indeed was the case in early Roman law.² However, in later times it became the law

that there was no forfeiture unless there was an express agreement to that effect. Such an agreement was termed a *pactum legis commissoriae*. Later still, the Emperor Constantine prohibited such an arrangement.³ Notwithstanding this, the Anglo Norman law hundreds of years later still regarded forfeiture as the principal pledge remedy.⁴

By Stair's time things had changed. An express clause was required. He states that the rules governing the treatment of *pactum legis commissoriae* are the same for pledges and wadsets.⁵ This glosses over the fact that with wadset the debtor only has a reversionary right whereas a pledger has ownership. Leaving this aside for now, the rule is that a forfeiture clause is not effective unless there is a court declarator giving it effect.⁶ The courts will do everything in their power to let the debtor purge the clause. In Erskine's words :

"The *pactum legis commissoriae* in moveable pledges has no stronger effects than in wadsets of land . . . and the same equity of redemption is indulged to the debtor in both cases."⁷

Hume states the rule in similar, but less anglicised terms.⁸ There are some *dicta* in a couple of nineteenth century cases in broad agreement with the institutional writers. However, little attention has been given to the subject since then.⁹

Gloag writes simply that a court would not enforce a forfeiture clause.¹⁰ He admits that he can only rely on heritable security cases to support this statement, but argues that the principle on which those cases were decided, that is that a forfeiture clause is oppressive, applies equally to pledge. This seems fair. The effective rejection of forfeiture by Scots law matches the position in a number of other systems.¹¹

In one limited situation the legislature does sanction forfeiture. Where property has been pledged to a licensed pawnbroker for less than £25 and the pawn has not been redeemed at the end of the redemption period of six months, title to the pawn passes to the pawnbroker.¹² There is *obiter* Sheriff Court authority to the effect that if the item forfeited is worth less than the sum lent, the pawnbroker does not have a personal action in respect of the deficit.¹³

1. See above, para 6.
2. R Zimmermann, *The Law of Obligations*, (1990), p 223.
3. See above, para 17.
4. See above, para 26.
5. *Stair*, I.13.14.
6. *Ibid.*
7. *Erskine*, III.1.33.
8. Hume, *Lectures*, IV.5.
9. *Latta v Park and Co* (1865) 3 M 508; *Earl of Hopetoun v Hunter's Trs* (1863) 1 M 1074 at 1095 per Lord Justice-Clerk Inglis.
10. W M Gloag, *Encyclopaedia*, vol 11, para 768.
11. For England, see *Carter v Wake* (1877) 4 Ch D 605, 606. For South Africa, see G Lubbe, *LAWSA*, para 495. See too the BGB, art 1229 and the Civil Code of Quebec, art 2748 and J B Claxton, *Security on Property and the Rights of Secured Creditors under the Civil Code of Quebec*, (1994), para 3.3.9.
12. Consumer Credit Act 1974 (c 39) s 120; *Lundie v Buchanan* (1862) 24 D 620.
13. *McMillan v Conrad* (1914) 30 Sh Ct Rep 275.

109. Extinction of pledge : discharge of obligation secured. The main way in which a right of pledge is brought to an end is by the pledger fulfilling the obligation which the pledge secures.¹ Being parasitic upon this obligation, this result is none other than would be expected.

1. Bell, *Principles*, s 203; *Douglas v Menzeis* (1569) Balfour 196. See too the Civil Code of Louisiana, art 3164; the Civil Code of Spain, art 1871 and the BGB, art 1252; *American Law Institute, Restatement of the Law of Security*, (1941), s 37(1).

110. Extinction of pledge : other causes. The following is a list of circumstances in which the right of pledge will be extinguished. It should not be treated as exhaustive.

(a) Destruction of the subject matter of the pledge. It is obviously not possible to have a right in something which no longer exists. If the property is destroyed, the

loss is borne by the pledger unless it is shown that the pledgee has not exercised ordinary care of the subject.¹

(b) Confusion. If the pledgee becomes owner of the subject matter, the pledge is extinguished in this manner.²

(c) Relinquishment of possession of pledged property. If the pledgee voluntarily gives up possession of the impignorated subject, other than for the most limited of purposes, the right of pledge is brought to an end : *mobilia non habent sequelam ex causa hypothecae*.³

(d) Renunciation or novation. The pledgee may renounce his right or the pledge agreement may be novated by another agreement between the parties.⁴

(e) Court order. The pledge may be set aside by a court, for example if a party was fraudulently induced into impignoring his property or if the pledge amounts to an unfair preference.⁵

1. On the pledgee's duty of care, see above para 100.

2. For example, if the pledgee buys the property. See the BGB, art 1256.

3. See above, para 101. *Erskine*, III.1.33; *North Western Bank v Poynter* (1894) 22 R (HL) 1. See too, the BGB, art 1253.

4. Cf G Lubbe, *LAWSA*, vol 17, para 502; BGB, art 1255; French Civil Code, art 2071.

5. On unfair preferences, see the Bankruptcy (Scotland) Act 1985 (c 66) s 36 and Insolvency Act 1986 (c 65) s 243.

14. COMPARATIVE CONCLUSIONS

111. General. In this final section on pledge, it is proposed to compare the modern law with both the Anglo-Norman rules and with the modern law from other jurisdictions. From this it will be possible to gauge the state of development which has been reached in the Scots law of pledge.

112. Similarities between the Anglo-Norman law and the modern law. Our law today is like the Anglo-Norman law in that it demands that the creditor has possession of moveable property before it will confer on him a right in security. Conventional hypothecs, which were very common in Roman law, have not found their way into our legal system. When Stair says "our custom hath taken away express hypothecations, of all or a part of the debtor's goods, without delivery" he was surely referring to Anglo-Norman law and the fact that the medieval royal courts would not allow security without possession. Glanvill's rationale was that the hypothec, in allowing property to be subject to successive securities, created situations too complex for royal justice to unravel. This reasoning is really not that far removed from Stair, Erskine and Bell's statements that in disallowing the hypothec commerce was made the more sure.¹

A second similarity is with the creditor's remedy upon the debtor's default. Unlike Roman law, the rule in Scotland from Anglo-Norman times has been that the creditor must go to court to enforce his security, unless the parties have expressly agreed otherwise. The remedy has changed. In medieval times it was forfeiture. In Stair's time it was diligence. Today it is sale by public auction. However, the courts retain their role as they always have done. Our rule contrasts with the modern English one where, as in classical Roman law, the creditor's power of sale is implied.²

The final point to note is that the duty of care which the pledgee must exercise in respect of the pledged property, although expressed in different ways, has not changed over the years. The pledgee has never been strictly liable. To use the modern language, he must exercise ordinary care.³

1. See above, paras 24, 36 and 88.

2. See above, paras 26 and 105-107.

3. See above, paras 25, 36 and 100.

113. Differences. The most important distinction between the modern law and the Anglo-Norman law is that pledge is now regarded as a collateral security. Forfeiture is no longer the remedy. The development in Scots law here mirrors that in most

other legal systems. What is peculiar is that the Romans made the transition more than a millenium before us. It may be noted, however, that the *Leges Quatuor Burgorum* seems to view wadset as a collateral security.¹

In the second place, it is to be noted that the modern law of heritable security is distinct from the modern law of moveable security. In Anglo-Norman times there was far more overlap between the two, *Regiam*, for example, applying pledge to both types of property.²

Thirdly, the modern law follows the civilian rule that a pledgee has no right to use the pledged property. Under the Anglo-Norman law, like the modern English law, he could use the property if the property would not be the worse for such use.³

In the fourth place, under the modern law if the keeping of the pledged property costs the pledgee expense he has a right against the pledger for reimbursement. Under the Anglo-Norman law he has no such implied right.⁴

A final point is that there is an evidential presumption in favour of the pledgee under the modern law, arising out of his possession of the pledged property. No such presumption existed in the Anglo-Norman law, where indeed the onus was on the creditor to prove that he possessed as pledgee.⁵

1. See above, paras 26, 29, and 105-108.

2. See above, paras 23, 29, 32, 36, 40 and 66.

3. See above, paras 25, 36 and 97.

4. See above, paras 25 and 99.

5. See above, paras 26 and 86.

114. Other jurisdictions. In this paragraph some general points will be made. The first is that pledge is the most basic and original form of real security in most or all legal systems, be they civilian, common law or otherwise.¹ The second point is that there are certain common features in the way that the law has developed in different countries. In particular, most jurisdictions have come to reject forfeiture and move

away from a unitary system of security in respect of moveable and immoveable property.²

As regards other systems, the Scots law of pledge is best placed within the civilian rather than the common law grouping. This is best illustrated by the pledgee not being entitled to make use of the property and also by the way he may recover necessary expenses which he has incurred.³ However, it is fair to say that the common law and civilian rules on pledge are generally very similar. In essence there must be an agreement to pledge, followed by delivery of the pledged property. The pledgee must keep possession or the pledge is extinguished.⁴

On a comparative analysis the Scots law of pledge is relatively underdeveloped. Two clear examples of this may be given. In the first place, in the absence of agreement the pledgee has to go to court to get permission to sell the pledged property upon default.⁵ Many other jurisdictions do not require this, although they often have detailed rules governing how the pledgee can realise his security.⁶ In the second place, leaving negotiable instruments aside, the Scots law of pledge is restricted to corporeal moveables.⁷ A considerable number of other systems permit the pledging of incorporeal moveable property, in particular receivables.⁸

1. See above, paras 10-11.

2. See above, paras 35, 40 and 108.

3. See above, paras 97 and 99.

4. See the European comparative works of J G Sauveplanne (ed), *Security over Corporeal Movables*, (1974) and M G Dickson, W Rosener and P M Storm (eds), *Security on Movable Property and Receivables in Europe*, (1988). For South African law, see G Lubbe, *LAWSA*, vol 17, paras 474-502. For Louisiana, see R Slovenko, "Of Pledge", (1958) 33 Tul LR 59.

5. See above, paras 105-106.

6. See above, para 107.

7. See above, paras 60-66.

8. See above, para 63.

115. Conclusion. The Scots law of pledge is a mixture of civilian and Anglo Norman law, with an emphasis on the former. If Stair were to come back today, he would see an area of law which is virtually in the same state as it was when he wrote his *Institutions*. The stagnancy in the area of express security over moveable property in Scotland is something which has naturally attracted criticism.¹ It will be interesting to see whether the release of a consultation paper on the subject by the Department of Trade and Industry ² will lead to our law being changed.

1. See, for example, *Gloag and Irvine*, pp 187-188 and D O'Donnell and D L Carey Miller, "Security over Moveables : A Longstanding Reform Agenda in Scots Law", (1997) 5 *Zeitschrift für Europäisches Privatrecht* 807.

2. See above, para 50.

PART 3 : LIEN

1. INTRODUCTION

116. Definition. A lien¹ is a real right to retain property from its owner until that owner discharges an obligation or obligations owed to the party retaining the property, the property not having come into the retaining party's hands for the purpose of security.² Where the property may be lawfully retained until the performance of a single obligation the right is known as one of "special lien".³ Where the law sanctions retention in respect of more than one obligation the right is known as "general lien".⁴ The party with the lien may be referred to as the "lien-holder".⁵ There appears to be no specific term for the party against whom the lien is being enforced. The Anglo-American terminology of "liencee" and "lienor" used to refer respectively to these parties does not seem to have come into Scots law.⁶

1. In other languages : *ius retentionis*, (Latin); *droit de rétention*, (French); *gesetzliches Pfandrecht*, (German); *retentionsret*, (Danish); *retentierecht*, (Dutch); *privilegio*, (Italian); *direito de retenção*, (Portuguese) and *derecho de retención*, (Spanish). Source : M G Dickson, W Rosener and P M Storm, *Security on Movable Property and Receivables in Europe*, (1988), p 218.

2. For alternative definitions, see Bell, *Principles*, s 1410; Lord McLaren in *Gladstone v McCallum* (1896) 23 R 783, 785; W M Gloag, *Encyclopaedia*, vol 9, sv "Lien"; J J Gow, *The Mercantile and Industrial Law of Scotland*, (1964), p 292; D M Walker, *Principles of Scottish Private Law*, (4th ed, 1989), vol III, p 399; W A Wilson, *The Scottish Law of Debt*, (2nd ed, 1991), para 7.7; A J Sim, *SME*, vol 20, para 66. For a standard English law definition, see Grose J in *Hammonds v Barclay* (1802) 2 East 227, 235; 102 ER 356 at 359.

3. See Bell, *Commentaries*, II.87; Bell, *Principles*, s 1411 and ss 1419-1430; A J Sim, *SME*, vol 20, paras 75-77 and below, paras 204-211.

4. See Bell, *Commentaries*, II.87; Bell, *Principles*, s 1411 and ss 1431-1454; A J Sim, *SME*, vol 20, para 75 and paras 78-100 and below, paras 236-243.

5. See for example, G L Gretton, "The Concept of Security" in D J Cusine (ed), *A Scots Conveyancing Miscellany*, (1987), p 126, at p 144; A J Sim, *SME*, vol 20, paras 67 and 73.

6. See for example, *A P Bell*, p 136; M G Bridge, *Personal Property Law*, (2nd ed, 1996), p 142; I Davies, *Textbook on Commercial Law*, (1992), p 319.

117. Uses of the word *lien*. In the field of juridical consistency the word "lien" has had rather a chequered history.¹ It is therefore not surprising to see it used in a number of different ways. The following is a list of some examples :

(1) *Lien* is used in the sense described above as a right to retain property owned by another securing an obligation or obligations. The word will be used in this sense here.

(2) *Lien* has been used to denote a right to retain of any nature, such as one based on ownership or a right to retain debts.² This is a wide use of the word and is best avoided, failing as it does to distinguish between retention based on ownership and retention on some other basis, such as custody or possession. The failure to make this distinction has caused great problems in the past.³

(3) Another wider interpretation of *lien* is using it to refer to retention not only of corporeal property but also of incorporeal property.⁴ However, as retention of incorporeal property would seem to be based on ownership and not a subordinate real right, this use may also be avoided.

(4) At its widest, *lien* has been used to mean security.⁵ Such use is also made abroad.⁶

(5) In the realm of maritime law, *lien* can be used to mean hypothec, that is security without possession or custody.⁷

(6) In Scotland, *lien*, or more accurately *real lien* has been used in the context of heritage as a synonym for the pecuniary real burden.⁸ Indeed, the term has been used generally to mean real burden, in other words a condition placed in the title to heritable property regulating the owner's use thereof.⁹

1. In particular as regards its relationship with the term *retention*. See the comments of Lord Ivory in *Hamilton v Western Bank* (1856) 19 D 152, 160; *Gloag and Irvine*, pp 303-304; A J Sim, *SME*, vol 20, para 66.

2. For example, W M Gloag, *Encyclopaedia*, vol 9, para 461; Lord Curriehill in *Henderson v Norrie* (1866) 4 M 691.

3. See the discussion by Lord Justice-Clerk Hope in *Brown v Sommerville* (1844) 6 D 1267 and *Melrose and Co v Hastie* (1851) 13 D 880. See also *Laurie v Denny's Tr* (1853) 15 D 404.

4. See for example, Bell, *Commentaries*, II,111 (factor's lien over price of goods) and the treatment of the case of *Dickson v Nicholson* (1855) 17 D 1011 (retention by commercial traveller of money in security of salary arrears) by *Gloag and Irvine*, p 344.

5. For example, by Lord Dreghorn in *Harper's Creditors v Faulds* (1791) Bell's Octavo Cases 440, 464. See also the Payment of Creditors (Scotland) Act 1793 (c 74) ss 33 and 39 and the Payment of Creditors (Scotland) Act 1814 (c 137) ss 42 and 50.

6. See for example, the American Law Institute, *Restatement of the Law of Security*, (1941), p 157; J J White and R S Summers, *Uniform Commercial Code*, (3rd ed, 1988), (Student Edition), para 23-3; S H Haimo, "A Practical Guide to Secured Transactions in France", (1983) 58 Tul LR 1163; C P Sherman, *Roman Law in the Modern World*, (1922), vol II, pp 194-195; P Gane in his 1939 translation of U Huber, *Heedensdaegse Rechtsgeleertheit*, III.10,11.

7. See *The Bold Buccleugh* (1851) 7 Moo PC 267; 13 ER 884; *Currie v McKnight* (1896) 24 R (HL) 1; Mansfield, "Maritime Liens" (1888) 16 LQR 381 and D R Thomas, *British Shipping Laws*, vol 14, (1980), chapter 1.

8. See *Martin v Paterson* 22 June 1808, FC; *Brown v Miller* (1820) 3 Ross LC 29; J P Wood, *Lectures in Conveyancing*, (1903), p 487 and the Glasgow Streets, Sewers and Buildings Consolidation Order Confirmation Act 1937 (1 Edw VIII and 1 Geo VI c xliii), s 236(1), discussed in *Pickard v Glasgow Corporation* 1970 SLT (Sh Ct) 63 and *Sowman v City of Glasgow DC* 1985 SLT 65.

9. See K G C Reid, "What is a Real Burden ?" 1984 JLSS 9 and the deed of conditions in J M Halliday's *Conveyancing Law and Practice*, Vol II, (1986), at p 171.

118. Etymology. The term "lien" is used in a number of legal systems, in particular those of Scotland, South Africa, England, Ireland, Quebec and the United States of America.¹ These jurisdictions have in common the use of the English language.² The word *lien*, however, had its origins furth of England. It comes from the Latin *ligamen*, meaning bond and its connected verb, *ligare*, to bind or tie.³ This Latin was taken into French as *lien* and the word still means tie or bond in that language today.⁴ On the other hand, if "lien" is looked up in an English-French dictionary it is found that the French use the term *droit de rétention* to mean *lien* in the way Scots law utilises the term.⁵

The Romans used the term *retentio* to mean *lien*.⁶ This comes straight into Scots law as "retention". The Anglo-Norman words for the concept - *reteign* and *deteign* - surely come from the same Latin root.⁷ In Rome *ius retentionis* meant the right which *retentio* gave.⁸ This terminology can be found in the occasional early Scots case.⁹ The term "hypothec" meaning real right of security without possession by the creditor has been far more used to denote that which would now more correctly be seen as *lien*.¹⁰ This is particularly true in the case of the right of the solicitor to retain his clients' papers till his account is paid, which even in this century has been referred to as a right of "hypothec".¹¹ The reasons for this use are examined

elsewhere.¹²

1. For South Africa, see T J Scott, *LAWSA*, vol 15, paras 98-136. For Quebec, see J B Claxton, *Security on Property and the Rights of Secured Creditors under the Civil Code of Quebec*, (1994), para 7.2.3. For England and Ireland, see *A P Bell*, chapter 6.

2. South Africa, of course, also uses Afrikaans to a considerable extent. Similarly, Quebec also uses French.

3. See *The Oxford English Dictionary*, (2nd ed), vol viii, sv "lien"; *Jowitt's Dictionary of English Law* sv "lien". See also the American Law Institute, *Restatement of the Law of Security*, (1941), p 157.

4. *Collins English-French Dictionary* sv "lien".

5. For a discussion of the *droit de rétention*, see Georges Brière de l'Isle in J G Sauveplanne (ed), *Security over Corporeal Movables*, (1974), p 115, at pp 120-121.

6. For example D.47.2.60; R Sohm, *Institutes of Roman Law*, (3rd ed, trans R Ledlie, 1907), p 281.

7. See the cases reported at *Year-book*, 5 Ed. IV, Pasch. pl. 20 (1466) and 22 Ed. IV, Hil. pl. 15 per Brian CJ (1483), discussed by Sir William Holdsworth, *History of English Law*, vol 7, p 512.

8. See *Thomas*, pp 276 and 277; *Buckland*, pp 213-214, 473 and 490; R W Leage, *Roman Private Law*, (3rd ed, by A M Prichard, 1962), pp 182-184 and 328-330.

9. See *Binning v Brotherstones* (1676) Mor 9137; *Cuthberts v Ross* (1697) 4 BS 374; *Creditors of Stuart v Stuart* (1709) Mor 2629, 2630. In *Mitchel v McAdam* (1712) Mor 11096 the term "*jus detinendi*" was used.

10. *Bankton*, I.17.2 and I.17.15; *Bell, Commentaries*, II,90.

11. See *Begg*, p 205; *Robertson v Ross* (1887) 15 R 67; *Ure & Macrae v Davies* (1917) 33 Sh Ct Rep 109.

12. See below, paras 147 and 149.

2. HISTORY

(a) Roman law

119. General. Unlike pledge, where there is ample evidence of a very early existence such as from the Bible,¹ it is difficult to find any information on either retention or lien from before the time of the Romans. Further, whereas pledge was treated in a reasonably coherent manner by the Roman texts and all the more so by later writers on the civil law,² the present writer for one is unaware of such a treatment when it comes to retention. There is, however, no lack of primary material

dispersed in the *Institutes* of Gaius and the *Corpus Iuris Civilis* of Justinian. This material may be divided broadly into two categories. Firstly, retention is seen to arise within property law, in the context of accession. Secondly, it is seen to arise within the law of contract. These categories may be examined in turn.

1. See, above, para 10 and for example, Genesis 38:18; Deuteronomy 24:6 and 24:10-13; V S Meiners, "Formal Requirements of Pledge Under Louisiana Civil Code 3158 and Related Articles" (1987) 48 La LR 129.

2. See, for example, *Buckland*, pp 470-478; *Thomas*, pp 329-334; R Sohm, *Institutes of Roman Law*, (trans J C Ledlie, 3rd ed. 1907); F Schulz, *Classical Roman Law*, (1951), pp 400-427.

(i) Retention in the context of accession

120. General. The Roman lien given by far the most juristic discussion was the right of the *bona fide* possessor to retain property he had lost due to *accessio*.¹ This doctrine, which has been taken into Scots law as accession,² holds that in certain circumstances where two pieces of corporeal property become joined together one (the accessory) is deemed to have become subsumed in the other (the principal).³ The factors dictating whether *accessio* have occurred include the degree of physical attachment between the things.⁴ The effect of the doctrine is that the owner of the principal becomes owner of the accessory as well by what is in modern law considered as original acquisition.⁵ There does not require to be any contract between the owner of the principal and the owner of the accessory to facilitate this. The circumstances in which retention arose in relation to *accessio* may now be considered.

1. This term is not used in a technical sense in the Roman law texts : see *Thomas*, p 169.

2. K G C Reid, *SME*, vol 18, para 570-596.

3. See *Buckland*, pp 208-215; *Thomas*, pp 169-174.

4. *Thomas*, p 169.

5. In other words he gets a new rather than a derivative title to the thing. See K G C Reid, *SME*, vol 18, para 539.

121. *Accessio* : moveables to moveables. Four situations are referred to in the texts involving *accessio* of moveable things to other moveable things.

(a) *Textura*. This was the situation where the thread of one individual was woven into that of another.¹ Justinian gives the example of the purple thread of one person being woven into a garment belonging to somebody else.² The garment is regarded as the principal and its owner becomes owner of the thread too.

(b) *Feruminatio*. This was where the property of one person was welded to that of another and the owner of the principal thing also became owner of the accessory.³

(c) *Scriptura*. Where one individual wrote upon the parchment or paper of another, the writing became the property of the owner of that which it had been written upon.⁴ This was the case even where the lettering was of gold.⁵

(d) *Pictura*. Where one individual painted upon the cloth or tablet of another, the law regarded the painting as the principal and the cloth or tablet as the accessory.⁶ Thus the owner of the painting became the owner of the cloth or tablet.

In all these situations the former owner of the accessory has suffered a loss. Whether that individual may obtain compensation depends on the circumstances. If it was he who knowingly brought about the *accessio* then he is regarded as having donated the thread to the owner of the principal.⁷ If, however, this was not the case then it seems likely that the former owner of the accessory, when he was not in possession of the whole property, was able to obtain compensation from the owner of the principal by virtue of an *actio in factum* or *actio utilis*.⁸

Where the former owner of the accessory was still in possession of the whole property having brought about the *accessio* in the *bona fide* belief that the principal was his own, he had the right to retain the item (*ius retentionis*) until he was compensated.⁹ In practice this worked by him meeting the *rei vindicatio* of the owner of the principal for recovery of his property with the defence of *exceptio doli*.¹⁰ The object of this defence in general in Roman law was to ameliorate the severity of a pursuer's claim.¹¹ In this case it was viewed as harsh to let the owner of the principal simply get the property without first compensating the *bona fide* former owner of the accessory. The availability of the *exceptio doli* in this situation predated the existence of the remedies of the *actio in factum* and *actio utilis*.¹²

1. Inst 2.1.26; D H van Zyl, *History and Principles of Roman Private Law*, (1983), p 160.
2. Inst 2.1.26.
3. D 6.1.23.5; D 41.1.27.2; van Zyl, pp 160-161; *Buckland*, p 209; M Kaser, *Roman Private Law*, (2nd ed, trans R Dannenbring, 1968), p 112.
4. G 2.77; Inst 2.1.33; D 6.1.23.3; van Zyl, p 161; *Buckland*, pp 209-210; Kaser, *ibid*, at p 111.
5. G 2.77; Inst 2.1.33.
6. Inst 2.1.34; G 2.78. Paul viewed the cloth or tablet as the principal ; D 6.1.23.3. See van Zyl, *ibid*, at p 162; *Buckland*, p 210; Kaser, *ibid*.
7. *Buckland, ibid*; van Zyl, *ibid*.
8. D 6.1.23.5; D 10.4.3.14; van Zyl, at pp 160-162. If the accessory had been stolen by the owner of the principal, its former owner had the *actio furti* or *condictio furtiva* : Inst 2.1.26.
9. Kaser, p 112; van Zyl, *ibid*.
10. G 2.76; Inst 2.1.33; *Buckland*, p 210.
11. See R Zimmermann, *The Law of Obligations*, (1990), at pp 667-668 and the judgement of Joubert JA in *Bank of Lisbon and South Africa Ltd v De Ormalas* 1988 (3) SA 580 A at pp 592-601.
12. *Buckland*, p 210.

122. Accessio : moveables to land. Two cases are of note here. The first is *inaedificatio*. This was where a building was constructed on the land of one person with the moveable property of another.¹ *Accessio* operated with the land as the principal and the moveables as the accessories. The remedies available here are similar to those discussed with regard to *accessio* of moveables to moveables. Thus if the builder used his own materials to build knowingly upon the land of another he was regarded as having donated the materials to the landowner.² If, however, he had carried out the work *bona fide*, and was not in possession of the land, then he would have an *actio in factum* or *actio utilis*.³ If still in possession he had a right of retention (*ius retentionis*) by virtue of which he could refuse to remove himself from the land until compensated for his materials and labours. As was the case with *accessio* of moveables to moveables, the right of retention was exercised by raising the defence of the *exceptio doli* against the *rei vindicatio* of the landowner.⁴

There existed also with regard to *inacditicatio* the possibility of a situation where one party had attached some of a second party's property to a third party's land. The rules which would apply here, in particular for our purposes where rights of retention would operate, have been subject to academic discussion.⁵ There is, however, no primary authority on the matter.

The second case involving *accessio* of moveables to land concerns plants and trees. Where an individual planted one of these organisms into the land of another (*implantatio*) or sowed seed into the same (*satio*) the planted or sown property was regarded to have acceded to the land upon it taking root and growing.⁶ A person who *bona fide* had carried out the planting or sowing was, according to Ulpian, entitled to an *utilis actio in rem* by which he could claim compensation against the landowner.⁷ Once again, however, retention could be pled by virtue of the *exceptio doli* if the *bona fide* planter or sower retained possession of the land.⁸

1. G 2.73; Inst 2.1.29; *van Zyl*, pp 162-164. For a full account of the law in this area, see *Buckland*, at pp 212-215; and *Kaser*, p 111.

2. Inst 2.1.30; *Buckland*, p 214. However, some texts do confer a right of action upon a *mala fide* builder : see D 6.1.37; C 3.32.5.1; D 5.3.38 and *van Zyl*, p 164. In Roman-Dutch law the *mala fide* builder may recover necessary expenses : Voet, 6.1.36. Note also *Bankton*, I.9.42.

3. *van Zyl*, p 164. There also existed in certain circumstances a *ius tollendi* or right to remove the materials, but the texts on it are notoriously unclear : see *Buckland*, p 213 and also *van Zyl*, p 164.

4. D 41.1.7.12; D 44.4.14; G 2.76; Inst 2.1.30; R W Leage, *Roman Private Law*, (3rd ed, by A M Prichard, 1961), pp 182-183; F Schulz, *Classical Roman Law*, (1951), p 365.

5. *Buckland*, pp 214-215; *Leage*, p 184.

6. G 2.74-75; Inst 2.1.31-32; *van Zyl*, p 165.

7. D 6.1.5.3.

8. G 2.76; Inst 2.1.32.

123. Conclusions upon retention in the context of *accessio*. In the first place, a *ius retentionis* will only arise where the person who brought about the *accessio* was in good faith and in possession. In the second place the right is not predicated upon any pre-existing relationship between the possessor of the property and its owner. Thirdly, the right is always founded in the defence of the *exceptio doli*. Fourthly, the

right may be exercised not only in respect of moveables, but in respect of land too. Fifthly, the right is available against the owner of the property whoever he might be at the time. Whether this made the right a real one is a matter that upon which the texts are silent.¹

Finally, whilst the *ius retentionis* arises here in the context of the property law doctrine of *accessio* it may also be analysed as arising in terms of unjustified enrichment. In other words, the fact that a party has *bona fide* brought about the *accessio* has led to the owner of the principal having become unjustly enriched.² He must therefore give that *bona fide* party recompense. Such an interpretation is consistent with the views of Buckland, who submits that in any situation where a party makes ameliorations to property under the mistaken belief it was his own, the law then gives him the *ius retentionis*.³

1. The analogous right in modern South African law is real : see T J Scott, *LAWSA*, vol 15, paras 103-116; H S Silberberg and J Schoeman, *The Law of Property*, (3rd ed, 1992), pp 465-466; *Wille's Law of Mortgage and Pledge in South Africa*, (3rd ed, ed Scott and Scott, 1987), p 87-92; J A Van der Walt and G J Pienaar, *Introduction to the Law of Property*, (1996), pp 371-374.

2. See, for example, *van Zyl*, p 164.

3. *Buckland*, p 538. It must be noted, however, that the measure of recovery was the loss to the former owner of the accessory rather than the gain by the owner of the principal : see G 2.77-78 and Inst 2.1.33-34. But cf *Leage*, pp 182-183 and 185.

(ii) Retention in the context of the law of contract

124. Right of depositary to retain for expenses. *Depositum* in Roman law was a contract whereby a piece of moveable property was entrusted by one person, usually its owner, to another, the depositary, for safekeeping.¹ The contract was a gratuitous one. The depositary was given mere detention (*detentio*) of the subject not possession. *Depositum* is one of the contracts in Roman law described as being imperfectly bilateral; others included loan for use and pledge.² Such contracts involved a principal claim which was for the return of the property and a counterclaim, for example for the restorer's expenses. The counterclaim was a contingent one, for example contingent on expenses having been incurred; thus the terminology imperfectly bilateral. The action to enforce the principal claim was called the *actio directa*; the one for the counterclaim called the *actio contraria*.³

Now, *depositum* often involved the depositary being put to expense, for example if Julius went off to Britannia on holiday leaving his slave in the custody of Brutus, the latter would have to feed the slave and so forth. In this situation Brutus would have the *actio depositi contraria* for his expenses (*impensae*).⁴ But, if Brutus was still detaining the slave the pre-Justinianic law gave him a separate quite distinct remedy of *retentio*, which could be pled by means of the *exceptio doli* when Julius raised his *actio depositi directa* to get his slave back.⁵ Indeed it is the case that this *ius retentionis* existed before the law recognised the *actio contraria*.⁶ Justinian, however, appears to have abolished this right, leaving the *actio depositi contraria* as the sole remedy in this situation.⁷

Two points need be made here on the *ius retentionis* which existed until Justinian. Firstly, it was based on mere detention rather than possession. Secondly, it was limited solely to expenses. Extrinsic debts were not secured.

1. D.16.3; C.4.34; Buckland, pp 467-470; Thomas, p 276; Leage, p 329.

2. Kaser, p 166; Leage, p 323.

3. D.16.3.5.pr; Thomas, p 277.

4. *Ibid*; Leage, p 329.

5. D.47.2.60; Buckland, p 468; Kaser, p 166; van Zyl, p 281.

6. Buckland, p 411.

7. C 4.34.11; Buckland, p 468; Leage, p 330. However, the right is recognised in modern civilian systems. See for example, the Civil Code of Louisiana, art 1948, the Civil Code of Quebec, art 2293 and the Civil Code of Spain, art 1780.

125. Right under contract of *commodatum* to retain for expenses. *Commodatum* was the contract in Roman law where a piece of property was lent by one party to another, for the latter's use.¹ Like *depositum*, *commodatum* was an imperfectly bilateral contract, in which mere detention not possession was given. The *actio directa* (*actio commodati directa*) and the *actio contraria* (*actio commodati contraria*) were similarly available.² Further, the party to whom the loan had been made also had the *ius retentionis* for expenses, a right which once again pre-dated the *actio contraria*.³ However, like retention in the case of *depositum* the right was not

available in the later law, having been removed by the Emperors Diocletian and Maximian.⁴

1. D.13.6; C.4.23; *Buckland*, pp 471-473; *Thomas*, pp 274-276; *Leage*, pp 326-329.

2. *Ibid.*

3. D 13.6.18.4; *Buckland*, pp 411 and 473; *Thomas*, p 276; *Leage*, p 328; *Kaser*, p 166; R Zimmermann, *The Law of Obligations*, (1990), p 201.

4. *Voet*, 13.6.10. Once again, the right exists nonetheless in modern civilian systems. See the Civil Code of Louisiana, arts 1890 and 1891 and the Civil Code of Quebec, art 2324. However, it does not exist in Spain : Civil Code of Spain, art 1747.

126. Retention under contract of *pignus*. *Pignus* was the Roman contract of pledge, in which property was delivered by one party to another in order to secure a debt.¹ Originally the property could only be retained until that debt was paid. However, the Emperor Gordian extended this right into a right to retain for all sums owed by debtor to creditor.²

1. See D.13.7; D.13.20; C.4.24; *Buckland*, pp 473-481; *Thomas*, pp 330-332.

2. C.8.26(27).1.2 (Gordian, A.D. 239); *Thomas*, pp 333-334; *Zimmermann*, pp 227-229; D H van Zyl, *History and Principles of Roman Private Law*, (1983), p 283.

127. Right of husband to retain part of dowry on divorce. In the event of divorce the Roman wife had the *actio rei uxoriae* to reclaim her *dos* (dowry) from her husband.¹ However, the husband had certain rights of retention (*retentio*), for example one sixth of the dowry if the divorce was caused by the wife's adultery.² However, these rights were permanent ones not simply being to secure the payment of debt. Thus they are better classified as rights of deduction and need not concern us further here.³

1. *Kaser*, pp 253-255.

2. *Ulp.Reg.*6.8; *Kaser*, p 253. See also *van Zyl*, p 108.

3. *Thomas*, pp 430-431. Justinian eventually abolished them : C.5.13.1.5.

128. Retention in Roman contracts - a universal right ? While the textual evidence seems limited to *depositum* and *commodatum*, there is academic opinion in favour of construing retention as a general contractual doctrine. Thus Kaser states that under any imperfectly bilateral contract :

"Instead of bringing a counter-action, the debtor who had a due counterclaim arising from the same obligation, could exercise a right of retention (*retentio*), that is, he could refuse to make his performance until the counter-performance was tendered to him. This he did by means of the *exceptio doli*."¹

Further, Kaser applies his thesis to perfectly bilateral contracts, that is those contracts in which each party was simultaneously creditor and debtor in respect of a principal claim.² The main examples are *emptio et venditio* (sale) and *locatio et conductio* (hire).³ To give an example of retention operating here, a party hiring out his slave could refuse to deliver the slave until paid the amount due under the contract of hire. Zimmermann makes express mention of retention of cargo by a ship's master for an average contribution under the *lex Rhodia de iactu*, in his discussion of *locatio et conductio*.⁴

Kaser's thesis seems to be in line with that of Sohm, whose discussion focuses on the *exceptio doli*, the practical means by which retention was pled as a defence to an action for delivery or performance.⁵ According to Sohm, the *exceptio doli* could be pled in any situation where the pursuer in an action was *ipsa res in se dolum habet*, that is wherever the raising of the action objectively constituted a breach of good faith.⁶ Thus it was clearly such a breach to raise an action against someone to perform his obligations under a contract he had made with you, if you were not prepared to meet your obligations to him under that same contract. As Sohm writes, the *exceptio doli* was :

". . . employed for giving effect to counter-claims either by means of a lien ('retentio') - where claim and counter-claim are not ejusdem generis (as eg where a defendant is called upon to deliver up some object, but claims compensation for moneys expended on such object) - or by means of a set-off ('compensatio'), where claim and counter-claim are ejusdem generis. Thus the exceptio doli came to be the exceptio of all exceptiones, which in the hands of

the Roman jurists became a weapon that enabled the *jus aequum* to defeat the old *jus strictum* at every point.”⁷

However, in the specific case of a contract of sale, Sohm writes that the right of the seller to defend an action for delivery by the buyer, on the ground that the price has not been paid, is technically termed the *exceptio non adimpleti contractus*.⁸ Moreover, it is the view of D H van Zyl that in the later law in any action upon a contract the defence that the other side has not yet made performance may be referred to in those terms.⁹ Hence it may well have been the case that as Roman contract law evolved the *exceptio doli* became refined into the *exceptio non adimpleti contractus*.¹⁰ This terminology is certainly familiar in modern civilian systems.¹¹

Kaser, Sohm and van Zyl may slightly differ in their use of terminology. Nevertheless the substance of what they say is much the same leading to the conclusion that retention was a part of general contractual doctrine in the later Roman law. However, it must be noted that what was being admitted was, to use the modern terminology, *special* retention; that is retention until reciprocal obligations under the *same* contract were performed. Other than in the particular case of pledge there is little evidence for general retention.¹²

1. Kaser, p 166.

2. *Ibid*, p 167.

3. *Ibid*.

4. R Zimmermann, *The Law of Obligations*, (1990), p 408 n 148.

5. R Sohm, *Institutes of Roman Law*, (3rd ed, trans J C Ledlie, 1907), pp 279-281.

6. *Ibid*, p 280.

7. *Ibid*, p 281.

8. *Ibid*, p 397.

9. van Zyl, p 254. He cites D 19.1.13.8 and D 21.1.31.8, both which involve contracts of sale. In many ways this supports Sohm's apparent view that the *exceptio non adimpleti contractus* only concerned sale, rather than his own wider one.

10. That is, in respect of perfectly bilateral contracts. With imperfectly bilateral contracts, it would always be the *exceptio doli* which was the relevant defence.

11. G H Treitel, *Remedies for Breach of Contract*, (1988), p 299 *et seq.*

12. That is, retention for claims other than those due under the specific contract in terms of which the property in question is being retained.

129. Effect of retention in Roman law. The preceding paragraphs show that retention existed widely in Roman law. Two broad categories were recognised. Firstly, there was retention arising in the context of *accessio*. This as we saw could be reanalysed as retention based upon enrichment, although it must be stressed that the primary texts simply deal with *accessio*. Secondly, there was retention based on contract. Whether the *ius retentionis* in either or both of these cases could be viewed as amounting to more than a personal right is a matter upon which it is difficult to draw any definite conclusions. It is interesting to note, for example, that the passages in the Digest stating that in a contract of sale the seller may retain the goods until he is paid refer to this right as a sort of pledge.¹ Thus the right to retain is being analysed as a security.

A matter of further interest is the way in which the law protects a party exercising a right of retention against theft. Any right of retention was dependent upon possession, or at least detention, of the subject in question. Where such possession or detention ceased, so did the right of retention. Hence, theft of the property, even by the owner himself, would bring an end to the right. However, in this situation the law provided a remedy. To be able to sue for theft, that is *furtum*, the party instituting the action had to show that he had an interest, that is *interesse*, in the stolen item.²

There are a number of situations where the texts tell us that the *interesse* was conferred. In the first place, it was given to a *bona fide* possessor, hence the holder of a right of retention based on enrichment was protected.³ Pledgees likewise had such an *interesse*.⁴ A borrower under the contract of *commodatum* who was retaining for expenses was treated in the same way.⁵ So too was a depositary under *depositum*, until of course Justinian removed his right of retention.⁶ Buckland is of the view that anyone with a right of retention for expenses had the *interesse*, at least when it came to *furtum* by the owner.⁷

It is very tempting to take everything one step further in the light of the Kaser/Sohm thesis and argue that anyone with a right of retention had the *interesse*.⁸ In many situations of mutual contract an *interesse* based specifically on the *ius retentionis* did not need to be utilised. For example if Claudius had contracted to sell his horse to Cicero and the animal was subsequently stolen, Claudius could sue the thief for *furtum* because he was the owner of the horse. Returning to the main line of argument, the lack of textual evidence makes it impossible to draw any definite conclusion on whether anybody with a right of retention was deemed to have an *interesse*. The key point is that it is certain that many did. Thus Roman law clearly regarded the *ius retentionis* as a valuable interest and that action could be taken against thieves who interfered with it.

1. Thus at D.19.1.13.8 it is stated that until the buyer pays the price "the seller can keep the object of sale as a sort of pledge", that is "*venditor enim quasi pignus retinere potest eam rem quam vendidit*." See also D.21.1.31.8. Of course in a Roman contract of sale *dominium* remained with the seller until delivery, so the right of retention here is based on ownership, although validly analysed in terms of the *exceptio non adimpleti contractus*. Note also that D.47.2.15.2 which refers to the *ius retentionis* of a borrower under *commodatum* refers to it as "*quasi pignoris*".

2. See generally, B Nicholas, *An Introduction to Roman Law*, (1962), pp 214-215; *Buckland*, pp 576-581.

3. D 47.2.12.1; *Buckland*, p 580.

4. There exist a number of conflicting texts on the basis of this *interesse*, such as D 47.2.14.16 and D 13.7.22.pr. See *Buckland*, p 580.

5. D.47.2.15; D.47.2.60; *Buckland*, *ibid*.

6. D.47.8.23.

7. *Buckland*, p 580. He bases his statement on D.47.2.15.2, D.47.2.60, D.47.8.2.23 and C.4.34.11. However, his assertion that there is only evidence for an action against the owner does not seem borne out by a reading of D.47.2.15.2 and D.47.8.2.23.

8. On that thesis, see above para 128. Zimmermann writes in *The Law of Obligations*, (1990), at pp 935-936 that an interest was conferred to "a bona fidei possessor or a person entitled to a *ius retentionis*." See also G.3.203 : "*Furti autem actio ei competit, cuius interest rem salvam esse, licet dominus non sit*" ("The *actio furti* is available to the person in whose interest it is that the thing is maintained, even if he is not the owner thereof.")

(b) The Medieval Period

130. Early Scots law. As far as can be seen there is no evidence of retention in either *Regiam Majestatem*, Balfour's *Practicks*, or any of the other Scots legal works

prior to Stair.¹ Even in the very Romanist sections of these works dealing with deposit and loan for use (*commodatum*) there is no reference to such a thing as a right of retention for expenses.² Professor Walker, who has researched this period of Scottish legal history in detail, apparently is unable to find anything either.³

1. See *Regiam Majestatem*, (Stair Soc vol 11, 1947, ed Lord Cooper); Balfour, *Practicks*, (Stair Soc, vols 21 and 22, 1962-63, ed P G B McNeill); Hope, *Major Practicks*, (Stair Soc vols 3 and 4, 1937-38, ed Lord Clyde).

2. See *Regiam Majestatem*, III,9; Balfour, *Practicks*, pp 197-199 and Hope, *Major Practicks*, II,5 and II,10

3. D M Walker, *A Legal History of Scotland*, vol 2, (1990) and vol 3, (1995).

131. English law. It is possible to find retention in medieval English law. The earliest case identified is one of 1371.¹ There existed in England at that time in the context of animals, a concept known as the franchise of waif and stray.² A person with such a franchise was obliged to keep the stray animal and to return it to its owner if he claimed it within a year and a day. However, in this situation the law allowed retention against the owner, until the franchisee had been given a sufficient sum for the animal's keep.³ *Prima facie* this right seems very similar to the *ius retentionis* for expenses conferred by Roman law on a borrower or depositary.⁴ Nevertheless, there is a key difference which is that there is no pre-existing contract between the parties here. Likewise, it is difficult to equate the franchisee's right with that of the Roman *bona fide* improver, for the franchisee here is under no delusion that he owns the animal.

It would seem that one must look elsewhere for the rationale behind this right of retention. The view of Sir William Holdsworth is that it arises in the context of the specific duties which the common law imposed upon a person with the franchise of waif and stray.⁵ For properly discharging these duties the franchisee was entitled to compensation for his expenses. Holdsworth's explanation may be tested by examining the manner in which retention of possession (later to become known as lien) developed thereafter in the common law.

By 1466 at the latest it was the law in England that an innkeeper could retain his guest's property in security of his account.⁶ Like the franchisee, the law imposed

certain duties upon the innkeeper : in particular, he was obliged if he had the room to receive any traveller who wished to stay at his inn.⁷ A common carrier, who was bound to carry goods if asked, was later given a similar right of retention for the debt owed to him.⁸

The idea of retention having arisen out of legal duty seems therefore to be a reasonable one.⁹ However, as Holdsworth himself points out, the principle of retention was quickly extended beyond its original parameters.¹⁰ At the same time, in 1466, when the courts were upholding the innkeeper's right of retention, they were giving a similar right to individuals such as tailors who had carried out work on a piece of property. Such individuals were held entitled to retain the chattel - to use the English terminology - until paid.¹¹ The courts asserted this principle again in 1483¹² and its broadness became accepted by the sixteenth century judge, Chief Justice Brooke :

"Vide libro Rastel, que stuffe, mise al taylor, fuller, shereman, weever, miller et hujusmodi, ne seront distreine, car ceux artificers sont pur le commun weale. Et eadem lex alibi de equo in communi hospitio, mes tiels artificers poent reteigner le stuffe pur lour wages pur lour labour".¹³

From this the term for retention in the old Anglo-Norman law can be seen to be "reteign(er)". "Deteign(er)" is also used.¹⁴ There is no sign of the term "lien".

There is one more area in which the early English law sanctioned retention and this was in the context of sale. By 1466 it seems to have been accepted that in absence of a special agreement providing for credit the unpaid seller of goods could retain possession of the chattels until he was paid the price.¹⁵ This may be seen very much as the medieval forerunner of s 41 of the Sale of Goods Act 1979 (c 54).

1. *Year-Book* 45 Ed. III. Pasch. pl. 30. It is of course the case that English law goes back well before 1371.

2. The concept is discussed in *Constable's Case* (1601) 5 Co Rep at f 107b; 77 ER 218 at 221-222.

3. See Sir William Holdsworth, *History of English Law*, vol 7, (1937), p 511.

4. See above, paras 124 and 125.

5. *Holdsworth, op cit*, n 2.

6. Y.B.B. 5 Ed. IV. Pasch. pl. 20; 22 Ed. IV. Hil. pl.5 per Brian CJ. The property involved in these cases was the guest's horse.

7. *Holdsworth*, pp 511-512. This remains the rule today : see *Halsbury*, vol 28, para 536.

8. *Holdsworth, ibid*; *Skinner v Upshaw* (1702) 2 Ld Raym 752; 92 ER 3; *Yorke v Greenhaugh* (1703) 2 Ld Raym 867; 92 ER 79 per Holt CJ with Powell J dissenting.

9. The thesis is accepted by *A P Bell*, pp 138-139.

10. *Ibid*, at p 512.

11. Y.B. 5 Ed. IV. Pasch. pl. 20; *Holdsworth, ibid*. The case is cited by *Gloag and Irvine*, p 351.

12. Y.B. 22 Ed. IV. Hil. pl. 15 per Brian CJ.

13. Brooke, *Abridgment of the Year-Books*, (1568), sv "Distresse" pl. 70, quoted by *Holdsworth*, p 512 n 6.

14. See Y.B. 5 Ed. IV. Pasch. pl. 20.

15. "Et meme le ley est si jeo achate de vous un cheval pur XXs vous reteignerez le cheval tanque vous estes pay de les XXs. mes que jeo paiera a vous a Michaelmas prochain ensuant. icy vous ne deteignerez le chival tanque vous estes pay etc," per Haydon *arg.* Y.B. 5 Ed. IV. Pasch. pl. 20. This is translated by Lord Ellenborough CJ in *Chase v Westmore* (1816) 5 M and S 180, at 187; 105 ER 1016 at 1019 : "Note, also, by Haydon. . . And the same law is, if I buy of you a horse for 20s. you may keep the horse until I pay you the 20s., but if I am to pay you at Michaelmas next ensuing, here you shall not keep the horse until you are paid."

132. Conclusions on the early English law. In summary, therefore, early English law conferred retention upon three classes of person :

(1) persons under certain public duties, in particular carriers and innkeepers;

(2) persons who have performed work on a particular chattel;

and (3) unpaid sellers.

To gain the benefit of a right of retention all of these individuals naturally had to be in possession of the subject which they were seeking to retain. Beyond that, there is no particular linkage between the three categories, other than perhaps that contract is usually involved. However, in class (1) the retention seems to arise out of the public duty involved, for example the duty on the carrier to carry, rather than the contract,

for example of carriage, formed thereafter. Indeed, as has been seen, in the case of waif and stray there was no contract at all.

Finding any similarities between these rights and the rights of retention in Roman law is also a difficult task, if simply looking at the primary Roman sources. Accepting the view of Kaser, on the other hand, that retention became a general contractual doctrine in the later Roman law would provide some common ground between it and classes (2) and (3).¹ However, the opinion of Sir William Holdsworth that class (2) grew out of class (1) would seem to negative the idea of Roman influence here.² Further, with regard to class (3), the English law of sale from the middle of the fifteenth century onwards was fundamentally different from the Roman *emptio venditio*. In the latter *dominium*, that is ownership, could not pass until the subject was delivered from seller to buyer. Thus a right of retention based merely on possession was an impossibility.³ In English law it has been the rule that ownership could pass without delivery since at least 1442.⁴

1. See above, para 128.

2. See the preceding paragraph.

3. See B Nicholas, *Introduction to Roman Law*, (1962), pp 178-179.

4. *Doige's Case* (1442) YB. 21 Hen. VI. f. 55 pl. 12. Previously the rule was the same as Roman law : see Bracton, *De Legibus et Consuetudinibus Angliae*, (c 1230), (trans Thorne), Vol II, p 181, which cites C.2.3.20 (*traditionibus et usucapionibus dominia rerum non nudis pactis transferentur*). For an account of how the law developed and changed, see C H S Filfoot, *History and Sources of the Common Law*, (1949), pp 226-229.

(c) The Seventeenth Century Civilian Writers of Europe.

133. General. The seventeenth century in Europe saw the publication of a number of important civilian treatises.¹ Pre-dating our own institutional works, they are of considerable relevance, as it is beyond doubt that they had an influence on Scots law. The connections between Scotland and the continent were very strong at the time. For example, Scottish law students were spending periods abroad in universities such as Bologna and Leiden.² Stair himself had a period of exile of seven years in Holland.³ A study of the work of the continental jurists of that era is clearly required.⁴

1. See O F Robinson, T D Fergus and W M Gordon, *European Legal History*, (2nd ed, 1994), chapter 7.

2. *Ibid*, pp 225-226.

3. *Ibid*, p 229. Admittedly this came after the first edition of his *Institutions* had been published in 1681.

4. This is more the case with lien than with pledge, where a systemised body of rules has existed since Roman times and been taken into most civilian jurisdictions with little variance. See above, para 114.

134. Grotius and Huber. Grotius lived from 1583 to 1645.¹ His treatise *Inleidinge tot de Hollandsche Rechtsgeleerdheid*, (Introduction to the Jurisprudence of Holland), was first published in 1631. It is surprising to find in such a broadly based work that there is no mention of retention, particularly in the context of accession, commodatum and deposit, with which it deals in a very Romanist manner.² A very similar finding is made on the examination of Ulric Huber's *Heedensdaegse Rechtsgeleertheyt*, (1686).³ Huber (1636-1694) was a prominent Dutch jurist, following in the footsteps of Grotius.

1. See O F Robinson, T D Fergus and W M Gordon, *European Legal History*, (2nd ed, 1994), pp 212-214; M Stolleis (ed), *Juristen : Ein biographisches Lexikon*, (1995), pp 257-260.

2. H Grotius, *Inleidinge tot de Hollandsche Rechtsgeleerdheid*, (trans R W Lee), III.9 and III.7.

3. U Huber, *Heedendaegse Rechtsgeleertheyt*, (trans P Gane, 1939), II.6.15-16, III.17 and III.18. See too Stolleis, pp 300-301.

135. Domat. Proceeding to the French jurist Jean Domat (1625-96) and his *Les loix civiles dans leur ordre naturel*, (The Civil Law in its Natural Order), (3 volumes, 1689-94) some interesting material may be found under the heading "Of the Privileges of Creditors".¹ This section clearly is a development from the tacit hypothecs which Roman law granted to an increasingly wide range of creditors as the Empire progressed.² Domat states that those with a privilege rank above any other creditor.³ This ranking will be in respect of all the debtor's assets if the privilege is a general one, or in respect of a particular asset if the law so restricts it. The privileges which seem relevant here are all restricted to particular assets, such as that of the carrier :

"Carriers have a privilege on the goods which they have carried, for the carriage of them, and for the duties of toll, customs, or others, which they shall have paid on account of the said goods. And the same privilege have all those whose money has been laid out in expenses of the like necessity, such as for the keeping and feeding of cattle, and others of the like kind."⁴

Indeed, as regards the second sentence, there is another privilege specially given to those who have laid out money to preserve some property.⁵ Another privilege which is of note is the one in favour of architects, workmen and artificers "who bestow their labour on buildings or other works, and who furnish materials".⁶ The privilege is over the property which has work done on it. The final privilege which seems of relevance is, however, a general one over the debtor's estate. It secures law charges where a debtor has died :

"The expenses of proving the will, or taking administration, of making inventories, of sales, orders of court, and discussions of movables or immovables, and all other necessary law charges are preferable to all other debts."⁷

As a matter of general discussion, it is not very difficult to find parallels elsewhere. The carrier's privilege is like the carrier's right of retention in the old English law and the modern carrier's lien.⁸ The privilege of the artificer also has its parallels in earlier English law and modern law.⁹ The salvor's lien of today's law is like the privilege of the preserver.¹⁰ Lastly, the privilege for law charges is not far removed from the modern solicitor's hypothec and solicitor's lien.¹¹ Despite all these parallels, there is one great difference between the privileges of Domat and the rights of retention of English and Scots law. The privileges do not require either possession or custody on behalf of the privileged creditor. In contrast, one with a right of retention necessarily must retain the subject to keep his right in it.¹²

1. Domat, *Les lois civiles dans leur ordre naturel*, (Paris, 1689), translated by W Strahan as *The Civil Law in its Natural Order*, (1850), part 1, III.5 (ss 1732-1769). See too M Stolleis (ed), *Juristen : Ein biographisches Lexikon*, (1995), pp 173-175.

2. See C P Sherman, *Roman Law in the Modern World*, (1922), vol II, pp 194-195. As can be seen by the inclusion of what we know as the landlord's hypothec : s 1749.

3. Above, n 1 at s 1736.

4. At s 1746. In later French law the carrier's privilege became dependent upon possession : see M Planiol, *Treatise on the Civil Law*, s 2521 and the French Civil Code, art 2102(6).

5. At s 1741. See now the French Civil Code, art 2102(3).

6. At s 1744.

7. At s 1760. Note that in the modern French law the privilege seems confined to court costs alone : French Civil code, art 2101(1).

8. See above, para 132 and below, paras 212-221.

9. See above, para 132 and below, para 207.

10. See Bell, *Principles*, s 1427. For the sake of clarity it should be noted that Scots law also recognises a hypothec for salvage : see W Guthrie's addendum to Bell, *Principles*, s 1397: *Hatton v A/s Durban Hansen* 1919 SC 154.

11. See *Gloag and Irvine*, pp 407-416 and pp 384-395.

12. Of course, this is not the case with the solicitor's hypothec.

136. Pufendorf. Samuel Pufendorf (1632-94), an influential German jurist, is best remembered for his textbook *De Jure Naturae et Gentium*, (On the Law of Nature and Nations), first published in 1672.¹ It does not contain many references to retention, but Pufendorf does seem to admit it impliedly in the case of accession brought about by a *bona fide* possessor, writing "if the builder be in possession, the owner of the land shall pay for the wages and the value of the material."²

The one express mention of retention comes very briefly in the context of compensation.³ Known as *compensatio* in Roman law, this is the doctrine where obligations owed between two parties may be set off against each other and thus extinguished. The doctrine generally is limited to liquid debts, for example if A owes B £5 and B owes A £10, compensation means if B pays A £5 both obligations are thereby discharged. Pufendorf points out that compensation can take place with consumable commodities which are the same. On the other hand different kinds of things or simply different things do not admit of compensation, writes Pufendorf, giving respectively the examples of "a jar of Rhine wine for a jar of Spanish" and that of "Bucephalus for an ordinary nag".⁴ He then comes to write the following :

"Although it often happens, even in reciprocal debts, that an obligation is not so much removed, as suspended by retention, whereby I keep to myself what I should have given another, until he has paid what he first owed me."⁵

This passage is an interesting one and suggests a right of retention based on mutual obligations in a contract, much like the interpretation of the later Roman law by Kaser and Sohm, discussed above.⁶ Such a right does not seem to be limited to certain categories of contract as in the old English law.

1. See *Robinson, Fergus and Gordon*, pp 214-216; M Stolleis (ed), *Juristen : Ein biographisches Lexikon*, (1995), pp 506-507.

2. *De Jure Naturae et Gentium* IV.7.6.

3. At V.11.6.

4. *Ibid.*

5. *Ibid.*

6. See above, para 128.

137. Voet. Johannes Voet (1647-1713) was a Roman-Dutch lawyer who achieved distinction with his major commentary on the Digest of Justinian, the *Commentarius ad Pandectas*, (1698-1704).¹ It remains to this day a highly influential work in South Africa.² Of all the works which have been examined, it contains by far the most on the subject of retention, with discussion in various places on the matter.

In the first place, Voet discusses the right of retention of a *bona fide* possessor who has made improvements.³ The discussion is a detailed one and every aspect of it will not be examined here. Voet begins with the general Roman principle that a possessor has only a right of retention for expenses and no separate action to recover them. The general rule is that the possessor recovers his expenses to the extent the property is enhanced in value. However, there are exceptions : in particular voluptuous expenses are not recoverable.⁴ By way of a contrast with Roman law, Voet states that possessors in bad faith may also retain under the modern law, unless they stole the property.⁵ This has been accepted into South African law.⁶

Next, reference may be made to some places where Voet simply reiterates the later Roman law. Thus in his discussion of deposit, he states that the depositary has no right to retain for expenses, a rule introduced by Justinian.⁷ In examining commodatum, he states that there is also no right of retention, following the enactments of Diocletian and Maximian.⁸ Likewise, discussing pledge, he states that when the debt which a pledge is securing has been extinguished, the creditor may retain the pledged property for another debt which is owed to him by the debtor.⁹ This rule was first enacted by the Emperor Gordian.¹⁰

The most valuable part of Voet's work, for present purposes, would seem to be his general discussion of retention in the context of compensation.¹¹ It is described by Gane as having become a "locus classicus".¹² Treating retention along with compensation as defences to actions is to adopt the same pattern as Pufendorf. However, Voet's work is more detailed. He begins by distinguishing the concepts :

"The right of retention is not to be confused with set-off, although it is in some things by no means unlike set-off, and on the analogy of set-off can be raised even in execution. . . . Retention applies even to individual things which do not allow of set-off, and is allowed even as to debts which are not liquid. And it does not destroy an obligation *ipso jure*, as happens indeed by set-off."¹³

As a preliminary point, this is the translation of Gane who translates *compensatio* as set-off, the English law term for compensation. More importantly, retention is seen as a defence mechanism generally available in the context of reciprocal obligations. However, one cannot retain for any debt, regardless of origin. In the words of Voet's near contemporary, Vinnius : "*Non posse creditorem, cui sine pignore pecunia debetur, rem debitoris pro eo quod sibi debetur retinere*".¹⁴ There may only be retention for that "*quod contrario iudicio consignari potest*",¹⁵ in other words, "*quod occasione quodam contractus, eis abest et vel maxime impensas necessarias*".¹⁶

Voet goes on to state that "retention finds employment in a number of causes."¹⁷ One of the causes he mentions concerns dowry and may be passed over.¹⁸ Another two concern maritime law : the right of a ship's master to retain merchandise for a contribution for jettison and, secondly, for freight.¹⁹ Next, there is the right of a

seller to retain the goods until the price is paid by the buyer. After that, comes the right of a factor to hold back merchandise entrusted to him by his principal until the principal pays the factor what he owes him. Finally, Voet writes :

"Especially is there room for retention on account of what is owed in connection with the thing retained, for instance, for expenses incurred upon it or for workmanship or craftsmanship bestowed about it. On those lines fullers, tailors, and possessors in good and in bad faith correctly safeguard themselves by holding back cloth, garments or to things possessed in order to procure wages or expenses incurred."²⁰

Various things may be said about Voet's list. Firstly, it is not intended to be an exhaustive one.²¹ Secondly, it is not limited to retention in the context of contract, as can be seen from the shipmaster's right to retain for general average and the similar right of possessors in good or bad faith for expenses. Thirdly, given the inclusion of the seller's right of retention, Voet does not differentiate between retention based on ownership and retention based on possession or custody.²² Fourthly, while his work has a Roman foundation, the rights of retention found in early English law are not far removed from some of those rights which he discusses.²³

1. See *Robinson, Fergus and Gordon*, p 218; M Stolleis (ed), *Juristen : Ein biographisches Lexikon*, (1995), p 641.

2. *Ibid*. Note how often it is cited in works such as *Wille's Law of Mortgage and Pledge in South Africa*, (3rd ed, ed T J Scott and S Scott, 1987) and H S Silberberg and J Schoeman, *The Law of Property*, (3rd ed, 1992).

3. *Commentarius ad Pandectas*, 6.1.36.

4. That, is luxurious outlays, *impensae voluptuariae*, which are unnecessary and undertaken because of caprice.

5. Above, n 3.

6. To a certain extent at least : see T J Scott, *LAWSA*, vol 15, para 106.

7. Voet, 16.3.9. See above, para 124.

8. Voet, 13.6.10.

9. Voet, 20.6.16.

10. See above, para 126 and R Zimmermann, *The Law of Obligations*, (1990), p 229.
11. Voet, 16.2.20.
12. Above, n 3, vol 3, p 147.
13. Voet, 16.2.20.
14. A Vinnius, *Selectarum juris quaestionum*, (1653), Lib. 1, c. 41, referred to in *Harper's Creditors v Faulds* (1791) Bell's Octavo Cases 440, at 455. A creditor may not retain the property of the debtor for money owed unless he has a right of pledge. My thanks to Mr Grant McLeod for his help with translating the Latin.
15. *Ibid*. He may retain for that which a court could award under a counterclaim.
16. *Ibid*. He may retain for that due under the contract, or for necessary expenses.
17. Voet, 16.2.20.
18. The right of a wife to hold back the property of her husband until her dowry and the rest of her woman's belongings are restored.
19. Gane translates the first right as applicable to any sailor. However, the right is usually stated to be that of the ship's master. This right goes back to Roman law as the *lex Rhodia de iactu* and is known in civilian systems now as general average. See *Robinson, Fergus and Gordon*, pp 91-92; *Zimmermann*, pp 406-412 and Bell, *Principles*, s 1426.
20. Voet, 16.2.20. He also goes on to state that retention passes to heirs and the matter of whether a tender of security will end the right of a retention, both showing retention to be a fairly well developed doctrine.
21. This is clear from the context of the discussion of retention as a defence to an action.
22. For, in the Roman law, the seller retained ownership until the property was delivered to the buyer : *traditionibus et usucapionibus dominia rerum non nudis pactis transferentur* (C.2.3.20 (Diocletian, 293)).
23. For example the English carrier's right of retention has parallels with the ship master's right to retain for freight.

138. Conclusions. In the writings which have been examined here it is possible to see a general reassertion of the Justinianic treatment of retention. What is also clear, from Pufendorf and Voet at least, is the perception of retention as a general legal doctrine functioning within the sphere of mutual obligations.¹ The silence of Grotius and Huber upon retention is interesting and suggests that until Voet there was little discussion on the matter in Roman-Dutch law.² Domat's allocation of non-possessory privileges to creditors in many of the situations in which comparative systems demanded custody or possession in order to secure a preference is

fascinating.³ His fundamental principles are, however, clearly taken once again from the law of ancient Rome.⁴

1. See above, paras 136 and 137.

2. See above, para 134.

3. See above, para 135.

4. In particular, from the tacit *hypotheca* : see C P Sherman, *Roman Law in the Modern World*, (1922), vol II, pp 194-195.

(d) The Later English Law

139. General. The English law of retention continued to develop after the medieval period, although the great writers Coke and Blackstone appear to be silent upon the matter.¹ In many ways the law remained consistent with its history in that, leaving the special case of the unpaid seller's lien aside, it recognised a sub-category of rights of retention based upon public duty as distinct from a sub-category based upon work done on a particular chattel.² Indeed there was a clear difference between the two in that the carrier and the innkeeper could validly plead their right against the owner of the property, even where they had no contractual relationship with him.³ Thus if A took B's horse to an inn without B's permission, the innkeeper could still effectually plead his right of retention, even against B, until A's bill was paid. With the other type of retention, the owner of the property was only bound if he or his agent had ordered the work to be done. The law remains the same today.⁴

1. Sir Edward Coke, *Institutes of the Laws of England*, (1628-1641); Sir William Blackstone, *Commentaries on the Laws of England*, (1791).

2. See above, para 132 and Sir William Holdsworth, *History of English Law*, vol 7, p 511; *A P Bell*, pp 138-141.

3. Holdsworth, *ibid*; *Robinson v Walter* (1617) 3 Bulstr 269; 81 ER 227 (innkeeper); *Yorke v Greenhaugh* (1703) 2 Ld Raym 866 at 867; 92 ER 79 at 80 per Holt CJ (carrier).

4. *Robins & Co v Gray* [1895] 2 QB 501; *Halsbury*, vol 28, para 535; G W Paton, *Bailment in the Common Law*, (1952), pp 219-221 and 273; M G Bridge, *Personal Property Law*, (2nd ed, 1996), pp 144-146; N E Palmer, *Bailment*, (2nd ed, 1991), pp 1013 and 1499-1501.

140. Terminology : the arrival of the word *lien*. Up until the eighteenth century any cases involving retention used the term *retention*, or its old Anglo-Norman equivalents, to label the right involved.¹ One case also had the reporter viewing the innkeeper's right of retention in terms of a pledge of the relevant property.² However, by 1734 at the latest a new word had come into English law which was used as a synonym for retention. That word was *lien*. The earliest case involves the right of retention of a solicitor, of which more will be said below.³ Here is what the Lord Chancellor has to say in it :

"The Attorney hath a Lien upon [his client's] Papers . . . and tho' this doth not arise by any express Contract or Agreement, yet it is as effectual being an implied Contract by Law."⁴

Lien soon became completely embedded in English law as an alternative for retention, with Lord Mansfield amongst others making great use of it.⁵ In passing it may be noted that the term did not make such an instant impression upon everyday English language, for Dr Johnson in his famous dictionary of 1755 only lists it as the past participle of the verb "to lie".⁶

The etymology of *lien* has been looked at elsewhere and it seems clear that the word came from France.⁷ What is curious though is that at that point in French law, *lien* was not looked upon as a right in respect of some property, but simply to mean obligation or warranty. For example, Pothier has a section in his *Traité des Obligations* of 1761 entitled "Du défaut de lien dans la personne qui promet."⁸ This translates as "Of want of obligation in the person promising" and deals with the situation where an obligation by someone to do something is regarded as void where its terms are that the person has an absolute liberty whether or not to perform the obligation.

What is particularly intriguing is that the word *lien* was also being used by the English lawyers of the seventeenth century, and indeed perhaps before, to mean obligation or warranty.⁹ Why *lien* was to take an altogether different meaning in the following century is unclear.

The truth perhaps lies in the natural meaning of *lien* in French as a bond or tie.¹⁰ *Lien* came into English law not simply to mean the right of someone to detain a chattel, but as a term for a nexus upon a particular piece of property. A completely separate species of rights, where a person had a right over some property without either possession or custody, existed in English law. These rights in the eighteenth century also became labelled as *liens* and today they are known as "equitable liens".¹¹ Liens which are synonymous with rights of retention are referred to strictly as "possessory liens".¹² Other than the possession/lack of possession distinction another important difference is that it is possible to have an equitable lien upon land, or real property to use the English law term.¹³ The possessory lien is confined to chattels.

By way of further proof that lien means nexus, reference may also be made to maritime law. In this legal area there exists a species of rights known as "maritime liens".¹⁴ These arise by operation of law in favour of certain individuals in respect of a ship. For example there is a maritime lien for salvage and a person whose property has been damaged by the ship, say in a collision, has the same right for the cost of the repairs.¹⁵ Maritime liens are not dependent on possession of the vessel.¹⁶ In civilian terms they may correctly be defined as hypothecs.¹⁷ The idea of "lien" being used to mean nexus comes out in one of the standard definitions of maritime lien :

"A Maritime lien must be something which adheres to the ship from the time that the fact happens which gave the Maritime lien, and then continues binding the ship until it is discharged".¹⁸

The lien created is good against the world, with English judges having used civilian terminology such as *jus in re aliena* to make clear this fact.¹⁹

1. For example, Y.B.B. 5 Ed. IV. Pasch. pl. 20; 22 Ed. IV. Hil. pl. 15 per Brian CJ; *Robinson v Walter* (1617) 3 Bulstr 269; 81 ER 227; *Chapman v Allen* (1632) Cro Car 271; 79 ER 836; *Jones v Pearle* (1723) 1 Stra 556; 93 ER 698.

2. *Robinson v Walter*, above.

3. See below, paras 141 and 147.

4. *Ex parte Bush* (1734) 2 Eq Cas Ab 109 pl 4; 22 ER 93.

5. See Lord Mansfield in *Green v Farmer* (1768) 4 Burr 2214 at 2218; 98 ER 154 and *Drinkwater v Goodwin* (1775) 1 Cowp 251 at 255; 58 ER 1070 at 1072. The word *lien* was also used in *Ex parte Shank* (1745) 1 Atk 234; 26 ER 151; *Ex parte Deeze* (1748) 1 Atk 228; 26 ER 146; *Turwin v Gibson* (1749) 3 Atk 720; 26 ER 1212; *Re Matthews ex parte Ockenden* (1754) 1 Atk 235; 26 ER 151; *Kruger v Wilcox* (1755) Amb 252; 77 ER 168 and *Kirkman v Shawcross* (1794) 6 TR 17; 101 ER 410.

6. Samuel Johnson, *Dictionary of the English Language*, (1755), sv "lien". He cites Genesis 26:10 (King James Version). As a matter of interest, Psalms 68:13 and Jeremiah 3:2 also use "lien" this way, in the King James Version.

7. See above, para 118.

8. R Pothier, *Traité des Obligations*, (1761), I.1.1.3.7 (s 47) translated by W D Evans as *Treatise on Obligations*, (1806), vol 1, p 28.

9. See W Rastell, *La Termes de la Ley*, (1624), which is used by Jowitt, *Dictionary of English Law* sv "lien" as authority for the proposition that lien "formerly denoted *obligatio*, generally, a warranty."

10. See above, para 118.

11. For an early equitable lien case in which the term "lien" is used, see *Burgess v Wheate* (1759) 1 Eden 177; 28 ER 652 (purchaser's lien). For equitable liens in general, see *Halsbury*, vol 28, paras 551-582; R M Goode, *Commercial Law*, (2nd ed, 1995), pp 669-670; A H Silvertown, *Law of Lien*, (1988), pp 8-11; R Bradgate and F White, *Commercial Law*, (3rd ed, 1996), p 270.

12. See Jowitt's *Dictionary of English Law*, sv "lien"; I Davies, *Textbook on Commercial Law*, (1992), p 320. They are alternatively known as legal or common law liens : see *Halsbury*, vol 28, para 502; R M Goode, *ibid*, pp 668-669; *Silvertown*, pp 5-7; *Bradgate and White*, p 269.

13. See *Halsbury*, above, n 12.

14. See D R Thomas in *British Shipping Laws*, vol 14, (1980), chapter 1; American Law Institute, *Restatement of the Law of Security*, (1941), pp 161-162; *SME*, vol 20, paras 274-286; A H Silvertown, *Law of Lien*, (1988), chapter 5. It appears that the term "maritime lien" was probably first coined in English law by Sir John Jervis in *The Bold Buccleugh* (1851) Moo PC 267; 13 ER 884 : see D R Thomas at p 2.

15. *D R Thomas*, p 13.

16. This is why these rights are discussed by *Gloag and Irvine*, pp 437-439 as "maritime hypothecs". See too D R Thomas, p 3; *The Bold Buccleugh* (1851) 7 Moo PC 267; 13 ER 884; *The Tervaete* [1922] P 259; *The St Merriel* [1963] P 247.

17. As discussed under this heading in Bell, *Principles*, ss 1397-1401; *Gloag and Irvine*, *ibid* and J J Gow, *The Mercantile and Industrial Law of Scotland*, (1964), p 298. See too D M Walker, *Principles of Scottish Private Law*, (4th ed, 1989), vol III, p 412.

18. *The Two Ellens* (1872) LR 4 PC 161 per Mellish LJ at 169. This was approved by Lord Macnaghten in *The Sara* (1889) 14 App Cas 209, 225. See *D R Thomas*, p 10.

19. See, for example, *The Ripon City* [1897] P 226 per Gorell Barnes J at 242; *The Tervaete* [1922] P 259.

141. Particular liens and general liens. The possessory liens which the common law had originally recognised were always particular ones.¹ In other words the person had the right to retain a particular item for a service performed in connection with it, such as repairing it or carrying it. A new development in the eighteenth century was the recognition of the general lien, where the relevant item could be retained for a general balance of accounts between the two parties in respect of like dealings between them.² General liens proved advantageous to the parties involved. For, in a series of contracts the knowledge that he had a general lien would make the lien-holder feel safe to hand back property held under earlier contracts, knowing that the property which he held under later contracts could serve as security for the total debt outstanding under them all.³

General liens arose initially from express contractual provision.⁴ However, it soon became established that certain professions were entitled to general liens as a matter of usage. Bankers, factors, insurance brokers, solicitors and stockbrokers appear on this list.⁵ In the latter part of the eighteenth century the English courts were keen to add to this list at every available opportunity. "The convenience of commerce and natural justice are on the side of liens" trumpeted Lord Mansfield.⁶ "It has been the universal wish of the Courts at all times to extend the lien as far as possible",⁷ declared Lord Kenyon CJ.

This great enthusiasm, however, was to come to an abrupt halt less than ten years after Lord Kenyon made that statement. Whilst the value of the general lien between the contracting parties was readily accepted, it also came to the attention of the courts the damage it could do to the interests of other creditors of the customer if he became insolvent.⁸ As Le Blanc J put it in 1805 :

"All these general liens infringe upon the system of the bankrupt laws, the object of which is to distribute the debtor's estate proportionally amongst all the creditors and they ought not to be encouraged."⁹

Rooke J was more blunt :

"I shall never unless bound by authority assent to the doctrine that these general liens are to affect the rights of third persons".¹⁰

The effect of this is that the movement to recognise general liens based on usage as widely as possible came to an end at the same time Nelson was winning the Battle of Trafalgar. Further, when it came to accepting that a general lien had been created the courts resolved to place a heavy burden of proof on a person seeking to establish the existence of such a right.¹¹ The development of the law of lien in England thus could never be said to follow any pre-ordained pattern.

1. See *A P Bell*, p 142. There is, however, some dispute about whether the innkeeper's lien is in fact a general lien. *Jowitt's Dictionary of English Law* sv "lien", for example, classifies it as such. Whether this lien is special or general is a matter which has been discussed in Scotland : see A J Sim in *SME*, vol 20, para 90. See below, para 227.

2. *A P Bell*, p 142. See generally, N E Palmer, *Bailment*, (2nd ed, 1991), pp 955-958.

3. I Davies, *Textbook on Commercial Law*, (1992), p 321; R Bradgate and F White, *Commercial Law*, (3rd ed, 1996), p 270; *A P Bell*, *ibid*; *US Steel Products Co v Great Western Ry Co* [1916] 1 AC 189 per Lord Parmoor at 211.

4. *Halsbury*, vol 28, para 516.

5. *A P Bell*, p 142; *Halsbury*, para 525; *Davies*, p 321; M G Bridge, *Personal Property Law*, (2nd ed, 1996), p 143; R M Goode, *Commercial Law*, (2nd ed, 1995), p 668.

6. *Green v Farmer* (1768) 4 Burr 2214 at 2221; 98 ER 154 at 158.

7. *Kirkman v Shawcross* (1794) 6 TR 14 at 17; 101 ER 410 at 412.

8. See *A P Bell*, pp 142-143; *Davies*, p 321; *Halsbury*, para 516.

9. *Rushforth v Hadfield* (1805) 6 East 519 at 528; 102 ER 1386 at 1390.

10. *Richardson v Goss* (1802) 3 Bos & Pul 119 at 126; 127 ER 65 at 69.

11. *Rushforth v Hadfield* (1805) 6 East 519; 102 ER 1386; (1806) 7 East 224; 103 ER 86; *Palmer*, above, n 2, p 956.

142. Summary of the scope of the possessory lien in English law. The events at the turn of the nineteenth century very much set the scene for the crystallisation of the law of lien in England into the state in which it has existed ever since. There is still the accepted division between particular liens and general liens.

The law will imply a particular lien in favour of certain individuals who have a public duty, for example the innkeeper and the carrier.¹ It will also imply one in favour of an individual in respect of a particular chattel where that individual has done work on that chattel.² That much has remained the same for hundreds of years, the law having "ossified" as one commentator puts it.³ This means and this point must be stressed, that English law does not imply a particular lien in every contract where one party has possession of the property of another, based upon the idea of mutuality of contract.⁴ It is, however, open to the parties to a contract to convince a court that the creation of such a lien has been intended. This may be done by pointing to an express term in the contract or by proving that such a term is implied, for example by usage.⁵

The law will imply a general lien in the situations where usage has been accepted to confer such a right. Prominent examples are the general liens of the banker, factor and solicitor.⁶ A general lien may also be created expressly or impliedly by a particular contract.⁷ It also may be created by public advertisement.⁸ Given, however, the unfair effect that a general lien is seen to give in the event of the customer's insolvency, the courts require a lot of persuasion to accept that such a right has been validly established.⁹

In certain situations, statute may confer a lien.¹⁰ The most prominent example is the lien of the unpaid seller under the Sale of Goods Act 1979, which in actual fact is merely declaratory of the English common law, which was discussed above.¹¹

1. See above, para 139.

2. *Ibid.*

3. *A P Bell*, p 139.

4. See for example, *Halsbury*, vol 28, paras 534 and 539. Compare Scots law : see A J Sim, *SME*, vol 20, paras 75-77.

5. *A P Bell*, p 142.

6. See above, para 141 and *Brandao v Barnett* (1846) 12 Cl & F 787; 8 ER 1622 (banker); *Kruger v Wilcox* (1755) Amb 252; 27 ER 168 (factor) and *Wilkins v Carmichael* (1779) 1 Doug KB 101; 99 ER 70 (solicitor). Usage may also be local : see *Halsbury*, vol 28, para 528.

7. *Halsbury*, vol 28, para 529; N E Palmer, *Bailment*, (2nd ed, 1991), p 955.

8. *Halsbury*, vol 28, para 530; *Kirkman v Shawcross* (1794) 6 TR 14; 101 ER 410.

9. See above, para 141.

10. *Halsbury*, vol 28, para 506; *A P Bell*, p 141; A H Silvertown, *Law of Lien*, (1988), chapter 12; R M Goode, *Commercial Law*, (2nd ed, 1995), p 670; R Bradgate and F White, *Commercial Law*, (3rd ed, 1996), p 270.

11. Sale of Goods Act 1979 (c 54), s 41. On the common law unpaid seller's lien, see above, para 131 and *Lickbarrow v Mason* (1793) 6 East 20n; 102 ER 1191; *Bloxam v Sanders* (1825) 4 B & C 941; 107 ER 1309; *Miles v Gorton* (1834) 2 Cr & M 504; 149 ER 860.

(c) Scots law from 1650-1800

143. Pre Stair case law. Prior to 1681 it is possible to isolate only a very small number of cases dealing with retention. One clear example, however, is *Binning v Brotherstones*,¹ in which it was held that a *bona fide* possessor had a right to retain land which he had improved until reimbursed by the true owner. The law set down in this case can be seen to be pure Roman law : any doubts on that matter are removed when it is seen that the right of retention is referred to as a *jus retentionis*. Another early case, *Earl of Bedford v Lord Balmerino*,² also involves land. There the court allowed a trustee to retain the property against an adjudger of the beneficiary's right, until his expenses were met.³

Two further early cases deal with the right of retention of what the reports refer to as "factors". One concerns a gentleman who was in fact a chamberlain and it was held that he was a servant and not truly a factor, thus had no right of retention.⁴ In the other the factory concerned was set up by a person going abroad.⁵ The factor he appointed was left to look after his property, *inter alia* being responsible for uplifting the rents. It was held that this factory could be revoked. Nevertheless, the court said that in this situation the factor had to be "refunded of what he profitably expended" before he had to give up possession. The rationale here seems Romanist too, with echoes of depositaries having the right to be refunded for such expenses.⁶

1. (1676) Mor 13401.

2. (1662) Mor 9135.

3. The right of retention is based on the trustee's ownership here. It was not until the nineteenth century that the difference between retention based on ownership and retention based on possession was finally settled. See, below, para 161.

4. *Pearson v Crichton* (1672) Mor 2625.

5. *Chalmers v Bassily* (1666) Mor 9137.

6. See above, para 124.

144. Stair (1). It may be stated at the outset that the treatment of retention by Stair in his *Institutions* of 1681 is very much in a civilian mould. There are three passages, all in Book 1, which are of particular interest. The first one comes in the context of Stair's discussion of *commodatum*, in other words loan for use.¹ He writes that where the borrower has laid out necessary or profitable expenses upon the subject, that he either may recover these by action or by retaining it until the lender satisfies his claim. The action the borrower has is described as "contrary" to the "direct" action of the lender to reclaim his property. The law enunciated by Stair is identical to the later Roman law of *commodatum* and indeed Stair cites the Digest of Justinian.² The only change is that he has anglicised the Latin terminology of *actio directa*, *actio contraria*, and *retentio/ius retentionis*.³

The next passage is found as part of Stair's treatment of *depositum* (deposit).⁴ He addresses the question of whether a depositary has a right of retention for expenses knowing that Justinian had abolished this right, a position accepted elsewhere in the *ius commune* :

"Though law and most interpreters favour the negative, upon the same ground that compensation is excluded; yet the affirmative is to be preferred, because as the contrary action is competent for the melioration, so much more the exception, it being part of the same contract."⁵

This passage is set against the background of Stair's discussion in the preceding paragraph of whether compensation was competent in the case of deposit.⁶ Justinian was credited with disallowing such an exception. Thus if A owed B 30 sheaves of corn and he had already deposited 50 with him under a separate contract, B could not appropriate 30 of those and thereby extinguish A's obligation. Stair writes that the rationale for the rule was that the very nature of the contract of deposit was that the property deposited must be capable of being restored on demand. Allowing compensation would prevent this. However, in Stair's considered opinion the

"convincing reason" why compensation is barred is because it concerns "things of the same nature and liquid", whereas :

"[I]n deposition, the dominion and possession of the thing remaineth in the depositor, though it be numerate money consigned, and to meddle with it is unwarrantable, and accounted in law theft".⁷

Applying this reasoning, there is no reason why retention should be barred. Retention does not amount to meddling, for the depositor will get his particular piece of property back, immediately upon defraying the depositary's expenses. Stair therefore admitted the right of retention for a depositary. Indeed he cites the 1662 case of *Earl of Bedford v Lord Balmerino*,⁸ as discussed above, to support his account of the law. Since this concerns the right of a trustee to retain heritage until his expenses are met, the case can only be considered to be of persuasive authority, for deposit in Scots law as in Roman law is confined to moveables.⁹ Moreover, the retention there was based on ownership rather than possession.

Before finishing his discussion of retention in the context of deposit, Stair writes in further justification of his position :

"And in all cases in the law where action is competent, exception is also competent, and so with us, if instantly verified."¹⁰

Thus for Stair, in Scots law exception is a remedy available in any situation in which it is clear that there is a right of action. Retention is a form of exception so is subject to that rule. It is not limited to particular forms of contract as under English law.¹¹ Indeed it is not limited to contract at all. It is a part of the general law of obligations.

1. *Stair*, I.11.12.

2. *Ibid.*

3. On which, see above, para 125.

4. *Stair*, I.13.9.

5. *Ibid.* On the *ius commune*, see *Voet*, 16.3.9. discussed above, para 137.

6. *Stair*, I.13.8.

7. *Ibid.*

8. (1662) Mor 9135, discussed in the preceding paragraph.

9. On the Roman law, see *Thomas*, p 276. On the Scots law, see J A K Huntley, *SME*, vol 8, para 4.

10. *Stair*, I.13.9. It is not clear what "instantly verified" means.

11. See above, para 142.

145. *Stair* (2). Now it may be argued that the conclusions made at the end of the last paragraph are somewhat sweeping, given the fact that they are based upon one sentence. It is therefore appropriate to turn now to the third and most general passage in the *Institutions* on the subject of retention, which may be quoted in full :

"Retention is not an absolute extinction of the obligation of repayment or restitution, but rather a suspension thereof, till satisfaction be made to the retainer; and therefore it is rather a dilatory than a peremptory exception, though sometimes, when that which is due to the retainer, is equivalent to the value of what is demanded, if either become liquid, it may turn into a compensation. Such is the right of mandatars, impledgers, and the like, who have interest to retain the things possessed by them, until the necessary and profitable expenses wared out by them thereupon be satisfied."¹

This passage appears within the title "Liberation from Obligations" and like the passage on retention in deposit, immediately follows a discussion on compensation.² *Stair's* treatment is remarkably similar to that of Voet.³ It seems accepted that Voet being a slightly later writer could not have influenced *Stair*.⁴ However, *Stair* may possibly have influenced Voet.

There is no doubt from the passage above and its context that *Stair* sees retention as a defence which is generally available within the law of obligations. The only matter in doubt is whether it is limited to obligations involving "necessary" or "profitable" expenses upon a piece of property. If there is such a limitation, then many situations where retention could potentially operated are excluded. So, for example, leaving express contract aside, an innkeeper under such a rule could not retain his guest's

luggage for his bill, unless for some peculiar reason he had laid out expenses upon that luggage.

Various reasons may be offered against such an interpretation. In the first place, if Stair recognised such a limitation he would have said so much more clearly. The use of the phrase "Such is the right" suggests that he is merely giving an example rather than stating that retention is so limited. Further, there is the fact that he says that retention may turn into compensation. Here he is obviously thinking of the retention of liquid debts and of course necessary or profitable expenses cannot be made in respect of a debt, as it is incorporeal. Viewing retention in a wide sense is also supported by the sentence from his title on deposit quoted above where he says that exception is available wherever action is competent.⁵ Finally, although retention had its origins in Roman law in claims for expenses laid out upon property, it seems very clear that both there later on and in the *ius commune* it was seen as a defence available in all sorts of obligations.⁶

1. *Stair*, I.18.7.

2. *Stair*, I.18.6.

3. *Voet*, 16.2.20.

4. See G M Hutton, "Purpose and Pattern of the Institutions" in *Stair Tercentenary Studies*, (Stair Soc, vol 33), p 79, at p 80. Voet's work was first published between 1698 and 1704. Stair had died in 1695.

5. *Stair*, I.13.9.

6. See above, paras 128, 136 and 137.

146. Conclusions on Stair's treatment of retention. Whilst the Roman basis of Stair's work is clear, it is interesting to note that he is silent upon one of the main rights of retention of the civil law, that of the *bona fide* possessor for improvements.¹ This sharply contrasts with the detailed treatment by Voet² of the matter and is indeed somewhat surprising given the case of *Binning v Brotherstones*³ of 1676 which deals with the matter.

As has been seen Stair views retention as a right available as a defence within the law of obligations as a whole. When he states that retention is pled by way of

exception, he does not enter into the question of whether the exception is the *exceptio doli* or the *exceptio non adimpleti contractus*.⁴ He seems to be unconcerned about differentiating between types of exception.

Stair can be shown always to treat retention as a matter concerned with the particular obligation in question and not other obligations between the two parties. In other words, there is nothing in the *Institutions* to suggest that Scots law in 1681 recognised anything akin to the general lien of today. As a matter of note, Stair does not say that a pledgee has a right of retention for all sums, a right which the Emperor Gordian gave to the Roman pledgee.⁵

A final point about Stair's work is that it does not make any distinction between retention based upon ownership and retention based upon merely custody or possession. This matter will be returned to.⁶

1. See above, paras 120-123.

2. *Voet*, 6.1.36.

3. (1676) Mor 13401. See above, para 143.

4. See above, para 128

5. See above, para 126.

6. See below, paras 161 and 199.

147. Scottish case law : 1681-1750. There is a gap of over sixty years between Stair and Bankton, the next institutional writer to deal with retention.¹ The period sees some notable developments in the case law. Just one year after Stair's *Institutions* were published, came what is probably the first Scots case on retention in the context of maritime law. The report of that case reads as follows :

"Found that though mariners and seamen had not a hypothecation upon the ship for their wages of their last voyage, yet they had *jus insistendi* and *retinendi*, while in possession of the ship, even against a person who had bought her after the voyage."²

Two points may be made about the right of seamen to retain a ship against its owner for their wages. Firstly, it is dependent on possession.³ Secondly, it is a real right enforceable against the owner's singular successor.

Another important case from the period in question is that of *Stephens v Creditors of the York Building Company*,⁴ decided in 1735. There the court held that a factor may retain the subjects of his constituent until he gets his salary and has his disbursements refunded. However, it is stated that his right is neither based upon compensation or retention, but is "upon a stronger footing". It is said to be "implied in the mutual contract betwixt them, and in all cases the *actio contraria* must meet the *actio directa*."⁵ Further, it is stated, that the right also attaches to money received by the factor when selling the constituent's goods.

While the decision in this case - that a factor has such a right - is beyond challenge, the reasoning is somewhat difficult to follow. The right is clearly one of retention. When it is stated that the right is "stronger" than retention what can only be meant is that the right is stronger than a normal right of retention because unlike such a right it also attaches to the proceeds of the subject matter if it is sold. But then this is simply a consequence of a factor's right to sell his principal's property.⁶ The other peculiarity here is the use of the terms *actio contraria* and *actio directa*. In Roman law these terms only appeared to have been used with regard to imperfectly bilateral contracts such as *depositum* and *commodatum*.⁷ These contracts were gratuitous : a contract of factory is not.⁸ Scots law appears therefore to be taking a more relaxed approach to the use of such terminology.

Most of the cases from this period concern the right of a solicitor to retain his client's papers until his account is settled. The earliest dates from 1697. It refers to the right in question as a "*jus retentionis et hypothecae*".⁹ Intriguingly, all the subsequent cases call the right a "tacit hypothec"¹⁰ or simply a "hypothec".¹¹ What is strange about this terminology is that the hypothec, as defined by Stair upon the basis of Roman law, is a non-possessory right of security.¹² The right of the law agent as set out in these cases depends on him physically holding the client's papers. Now, certainly at that time in France, Domat had based his privilege for law charges upon the tacit hypothecs of Roman law.¹³ Indeed at least one of the cases also refers to the right as a "privilege".¹⁴ However, there is no evidence of French law requiring

physical detention to enforce the right. The Scottish adoption of this terminology also caused some puzzlement among the judiciary, for in one case :

"Some thought that the right competent to agents was improperly called a hypothec, as it is no pledge or real right, but only a personal right of retention of the writs while they are in his hands".¹⁵

The rest of the judges disagreed and said it was not a mere personal right. While they stated that the agent's right "was a creature of the Court introduced for the agent's security, who otherways would not undertake the affairs of a person of doubted circumstances",¹⁶ no comment was offered on the use of the term "hypothec". Further analysis of the issue is required.

The law agent's right of retention will be discussed in detail elsewhere,¹⁷ but for the moment two further points arising out of the early case law will be made. Firstly, in one of the oldest cases it was suggested that the right was available only where the agent had no written proof of his client's indebtedness.¹⁸ The court rejected the suggestion, holding that it was not so limited. Secondly, the cases indicate that a client's papers may be detained until his entire account is settled.¹⁹ Thus this right of retention, to use the English terminology, is a general one.²⁰

Before concluding upon this matter, it is of interest to note that the right of retention of a solicitor seems to have come into English law at about the same time as it was recognised in Scots law.²¹ It is the view of Lord Cuninghame that "our hypothec, if not originally borrowed from English practice, is in many respects the same"²² as the English attorney's right of retention. There is no direct evidence of the Scots right having such an origin. However, it is beyond doubt that English law was to prove of great influence in this area as time went on.²³

1. See the next paragraph. Sir George Mackenzie of Roschaugh, appears to say nothing on retention in his *Institutions of the Law of Scotland*, (1684).

2. *Seamen of "Golden Star" v Miln* (1682) Mor 6259. The case of *Sands v Scott* (1708) Mor 6259 has a similar ratio.

3. The law was to change at a later date. See Bell, *Commentaries*, I,562 and *Gloag and Irvine*, p 438.

4. (1735) Mor 9140. This case is also discussed below in para 260.

5. *Ibid.*

6. See *Broughton v Stewart, Primrose and Co* 17 Dec 1814, FC.

7. See above, paras 124 and 125.

8. Factors are due a salary. A gratuitous factor is known as a mandatory, or formerly a "mandatar" as in *Stair*, I.18.7.

9. *Cuthberts v Ross* (1697) 4 BS 374.

10. *Cochran v Houston* (1708) 4 BS 721.

11. For example, *Ayton v Colville* (1705) Mor 6247; *Earl of Sutherland v Coupar* (1738) Mor 6247 and *Stewart* (1742) Mor 6248.

12. *Stair*, I.13.14.

13. See above, para 135.

14. *Cochran v Houston* (1708) 4 BS 721.

15. *Lidderdale's Creditors v Nasmyth* (1749) Mor 6248, 6249.

16. *Ibid.*

17. See below, paras 265-271.

18. *Ayton v Colville* (1705) Mor 6247. Similar arguments have been made about the foundation of the lien in English law : see J B Ames, *Lectures in Legal History*, (1913), pp 157-158 and G W Paton, *Bailment in the Common Law*, (1952), p 187.

19. For example, *Lidderdale's Creditors v Nasmyth* (1749) Mor 6248 at 6250, where it was held that the Writer to the Signet there had a "right to retain the writs, till paid of his account due to him as a writer".

20. Or the post Bell Scots terminology. See, for example, Bell, *Commentaries*, II,107.

21. According to Sir William Holdsworth, *History of English Law*, vol 12, p 60, the solicitor's lien was first recognised in English law in 1688. In 1779 in *Wilkins v Carmichael* (1779) 1 Dougl KB 104; 99 ER 70 at 72 Lord Mansfield stated that the right "was not very ancient".

22. *Kemp v Youngs* (1838) 16 S 500, 503.

23. See Bell, *Commentaries*, II,107-109; Begg, chapter 15; *Gloag and Irvine*, pp 384-395.

148. Bankton (1) : retention in general. Bankton's *An Institute of the Laws of Scotland* (1751-53) contains much valuable detail on retention. It is of particular

interest for its "Observations on the Law of England". Leaving these aside for the moment, Bankton's discussion of Scots law, like Stair's, has clear roots in Roman law. This can be seen firstly in the case of the right of a *bona fide* possessor to retain property until the expenses he has laid out are met by the true owner.¹ An area which Stair is silent upon, Bankton deals with it in no less than three different places in his *Institute*.² In his most detailed discussion of the matter, within his title on recompense, he firstly sets out the Roman law before turning to the law of Scotland.³ The basic rule is that the *bona fide* possessor may retain for necessary and profitable expenses, but not voluptuary ones "laid out only for decorment".⁴ This rule is exactly the same as the one in Roman-Dutch law.⁵

The rationale behind this right of retention is given by Bankton when he is discussing it as a defence to an action of removing :

"This is founded on the rule of law and justice, *Nemo debet locupletior fieri cum alterius jactura*, None ought to enrich himself by the spoils of another."⁶

Thus Scots law recognises a right of retention founded upon unjustified enrichment, as developed out of Roman law.

Looking for the other traditional areas in which retention is likely to appear, it is surprising to note that when discussing deposit, Bankton merely states that a depositary has a contrary action for expenses when the depositor reclaims his property.⁷ There is no mention of a right of retention. However, the matter does feature in his discussion of "Commodate". He states that in the earlier Roman law a borrower had the right.⁸ However, he goes on to note that the later constitutions removed it.⁹ Bankton opines that Scots law allows a right of retention here, which of course was the view of Stair :

"By our law (and the modern law of other countries) the possessor, in all such cases, has an hypothec or right of retention of the thing, till his damages and expences are refunded".¹⁰

The vocabulary here is interesting. "Hypothec" is being used synonymously with right of retention. Certainly there is precedent for this in the case law, as we have

seen, with the law agent's right of retention.¹¹ Leaving this aside temporarily, the substance of the passage also merits comment. His authority for the foreign law is Voet.¹² The width of the statement made suggests in hindsight that Bankton would allow a depositary retention. Indeed it is suggestive of him allowing any possessor the right.

Whether this was actually what Bankton meant may be more accurately ascertained by examining his general discussion of retention. Just like Pufendorf, Stair and Voet, this comes immediately in the wake of a discussion of compensation.¹³ Bankton begins by saying that although retention resembles compensation the two are quite different. Then comes a very important statement giving his understanding of retention :

"It is granted for one's security till he is paid or relieved, in respect to counter claims he has against the party whose effects are retained"¹⁴

Therefore it would seem clear that Bankton like Stair sees retention as a remedy generally available within the law of obligations. Further, Bankton expressly views retention as a form of security, something which Stair did not. He gives specific examples of the right operating : a subject may be retained for expenses laid out upon it, a cautioner in a liquid bond may retain any debt due by him to the principal debtor and a factor may retain his constituent's property until relieved of all debts due to him, a right which prevails over diligence.¹⁵ It will be immediately noticed from this list that Bankton does not confine retention to corporeal moveables. Nor does he worry about any distinction between special retention, as in the case of expenses upon property, and general retention, as in the case of the cautioner and factor. The conclusion is that matters are not as juridically clear as they could be.

1. On the Roman law, see above, paras 120-123.

2. *Bankton*, I.8.15, I.9.42 and II.9.68.

3. *Bankton*, I.9.42. Perhaps, more correctly, he discusses the civil law in the light of the *ius commune*, for he mentions the right of the *male fide* possessor to detain for expenses, a matter found in Voet rather than the work of Justinian. See Voet, 6.1.36.

4. *Bankton*, I.9.42.

5. Voet, 6.1.36; A J Van der Walt and G J Pienaar, *Introduction to the Law of Property*, (1996), pp 371-373.

6. *Bankton*, II.9.68. The rule was first expressed in this form by Pomponius : "Nam hoc natura aequum est neminem cum alterius detrimento fieri locupletiores" (D.12.6.14). Bankton cites *Binning v Brotherstones* (1676) Mor 13401.

7. *Bankton*, I.15.3.

8. *Bankton*, I.14.6.

9. See above, para 125.

10. *Bankton*, I.14.6.

11. See above, para 147.

12. *Bankton*, I.14.6, note c.

13. *Bankton*, I.24.23-33. He entitles section 4 of I.24 "Compensation, and Retention".

14. *Bankton*, I.24.34.

15. *Ibid.*

149. Bankton (2) : retention in the particular context of security. As was seen above, in his discussion on "Commodate" Bankton equated right of retention with hypothec. Why he does this becomes apparent if his general treatment of hypothec within his title on "Pledge" is examined. Stating that "hypothec" in Roman law meant non-possessory security, he adds :

"But, with us, in the proper sense, Hypothec is applied to the creditor's security, introduced by the provision of law".¹

As "hypothec" was viewed as meaning tacit security in 1749, by Bankton at least, it is very straightforward to see why retention in turn is viewed as a hypothec. Further, this knowledge goes a long way to explaining why the case law refers to the law agent's right to retain his client's papers as one of hypothec.²

Bankton further expounds "hypothec" later in the title by saying that it only applies to corporeal moveables.³ Thus the right of retention of a cautioner cannot be referred to as a cautioner's hypothec. In a small way, then, Bankton does eventually distinguish retention in terms of different types of property. Also within his title on

"Pledge", he expressly mentions the "tacit hypothec or right of retention"⁴ of the lawful possessor. He gives two examples of this : the right of the law agent to retain his client's papers and the right of a tradesman to detain the subject he has worked upon.⁵ It is interesting that he did not give these examples in his general discussion of retention. The conclusion could be drawn that Bankton more readily associates these rights with the law of security rather than the law of obligations, although of course they are part of both.

In his "Observations on the Law of England" on the subject of pledge, Bankton mentions three rights of retention : that of the innkeeper in respect of his guest's horse, that of the tailor over clothes made and that of the agent or attorney over his client's papers.⁶ This is correct in so far as it goes, but is certainly not a comprehensive account of the English law of the time.⁷ Bankton also argues that it is more accurate to view these rights as ones of retention and not hypothec.⁸ However, this seems to amount to a deferral to the English terminology, for these rights clearly fall under "hypothec" in the sense he uses the word.

1. *Bankton*, I.17.2.

2. For example, *Ayton v Colville* (1705) Mor 6247; *Earl of Sutherland v Coupar* (1738) Mor 6247 and *Stewart* (1742) Mor 6248. See, above, para 147.

3. *Bankton*, I.17.17.

4. *Bankton*, I.17.15.

5. *Ibid.*

6. *Bankton*, "Observations on the Law of England", I.17.10, citing Coke's *Institute*.

7. For example, the right of retention of the carrier is missing. The English law of the time is discussed above, paras 139-140 and 141.

8. *Bankton*, "Observations on the Law of England", I.17.10.

150. Bankton (3) : use of "lien". A final important point about Bankton's work is that it appears to have the earliest example of the word "lien" being used in Scotland. Intriguingly, the word is not to be found in the context of retention, nor indeed that of corporeal moveables. It is to be found in his treatment of heritable security, within his discussion of the pecuniary real burden. Bankton writes :

"To explain a little farther real debts or burthens, termed *Debita fundi*, the ground is properly debtor in those, it being therewith affected, and such debts a real Lien thereon, to use the term in English law".¹

He goes on in his subsequent "Observations on the Law of England", to use the expression "real Lien" in the context of security over land south of the border.² Therefore it is not in doubt that the word "lien" came to Scots law from English law.

The way in which the term is being used is curious. As has been shown, "lien" first appeared in English law round about twenty years before Bankton wrote.³ It was used in the sense of nexus, in accordance with its literal French meaning of tie or bond. Now whilst the term was clearly used in English land law at the time when Bankton wrote, there is far more evidence of it being used in the context of movable property, in particular with regard to rights of retention.⁴ The mystery, then, is why Bankton imported the term when discussing security over land and not when discussing security over moveables. As of yet it is a mystery which is unsolved.

Two further points must be made about the term "real Lien". Firstly, there is the issue of "lien" being spelt with a capital "L". This can be traced to the early English cases which use the term.⁵ Secondly, there is the issue of the word "real". Now, it may be thought that this means real as in *jus in re*, as in "real burden". But it does not. It means real as in "real property", the English term for heritage.⁶ This is quite clear from the context.⁷ In other words "real lien" means "heritable lien", a fact which is easily overlooked.⁸

1. *Bankton*, II.5.18.

2. *Bankton*, "Observations on the Laws of England", II.5.3.

3. See above, para 140.

4. *Ibid.*

5. For example, *Ex parte Bush* (1734) 2 Eq Cas Ab 109 pl 4; 22 ER 93.

6. See, for example *A P Bell*, p 1; K E Digby, *History of the Law of Real Property*, (5th ed, 1897); R Megarry and H W R Wade, *The Law of Real Property*, (6th ed, 1996); G C Cheshire and E H Burn, *Modern Law of Real Property*, (14th ed, 1988).

7. That is, the direct lifting of an English law term into Scots law.

8. For example, Lord Cuninghame in *Wilmot v Wilson* (1841) 3 D 815, at 818.

151. Bankton (4) : summary. Whilst also based fundamentally upon Roman law, Bankton's work differs from Stair's in that he expressly views a right of retention as a right in security.¹ Unlike Stair, too, he gives a detailed discourse of the *bona fide* possessor's right to retain for improvements.² Further, he makes reference as to specific examples of retention operating in places where there is no Roman authority, such as the law agent's right in respect of his client's papers.³ However, he does not really distinguish between retention based upon ownership and retention based upon custody or possession, nor retention in respect of different types of property.⁴ Finally, it is in Bankton's *Institute* that the word "lien" appears for the first time in Scots law, although admittedly not in the context of retention.⁵

1. See above, paras 148 and 149.

2. See above, para 148.

3. See above, para 149.

4. Except in that he says that a cautioner's right of retention cannot be a hypothec, within his definition of that term. See above, paras 148 and 149.

5. See above, para 150.

152. Kames. In his *Principles of Equity*, Lord Kames discusses retention in the same way as earlier writers, by comparing it to compensation.¹ He describes the right as "an equitable exception" available to a "defendant" allowing him "to withhold performance from the pursuer, till the pursuer *simul et semel* perform to him".² Thus once again retention is seen as a generally available remedy.

Kames goes on to say that "retention is founded solely on utility",³ being admitted purely to reduce the number of law-suits. There is certainly a truth here, in that a plea of retention allows a party to assert his rights without having to raise a separate action against the party he wishes to assert his rights against. And according to Kames :

"The utility of retention has gained it admittance in all civilised nations."⁴

This bald statement takes no account of, for example, the great differences between the relevant English and Scots law at the time. Further his statement that retention is solely based upon utility whereas compensation is based upon both equity and utility, is difficult to square with his earlier utterance that retention is an equitable exception. Kames finishes his discussion of retention in his *Principles of Equity* by considering retention under an English mortgage and a wadset, matters which will be passed over here.⁵

Another of Kames' works, his *Historical Law Tracts*, first published in 1758, merits our attention in that he uses the word "lien" in it.⁶ Like Bankton, he refers to the term "real lien" in his chapter on heritable securities.⁷ However, unlike the earlier writer, he uses "lien" in the context of moveables. He writes :

"The *nexus*, or lien, of property was greatly strengthened, when it was now become law, that no man could be deprived of his property without his own consent; except singly in the case of a purchase *bona fide* in open market."⁸

Leaving aside the fact that this seems to be an account of English than Scots law,⁹ it is seen that Kames expressly views "lien" as a nexus. Nevertheless, the use is peculiar in that the English authorities of the time as well as Bankton use it to mean the nexus of a security holder, not that of the owner of property.¹⁰ What is important for present purposes is that "lien" has yet to be used in Scotland to mean right of retention. On a more general front, the conclusion upon the work of Kames is that it is somewhat esoteric.

1. Lord Kames, *Principles of Equity*, (3rd ed, 1778), vol 2, p 100.

2. *Ibid*, pp 100-101.

3. *Ibid*, p 101. He repeats the statement that retention depends entirely on the utility of abridging law-suits at p 130, but adds in respect of his discussion of justice there : "But if it have no support from justice, it meets on the other hand with no opposition from it."

4. *Ibid*.

5. *Ibid*, pp 101-105.

6. The work went to four editions, the last being published in 1792.

7. Lord Kames, *Historical Law Tracts*, (1758), p 233; (4th ed, 1792), p 165.

8. *Ibid.*, p 141; (4th ed, 1817), p 101. He also writes at p 142 (4th ed, p 101) : "The *nexus*, or lien, of property being originally slight, it was not thought unjust to deprive a man of his property by means of a *bona fide* purchase, even where the subject was sold by a robber."

9. The rule in Scotland always having been a direct application of *nemo plus juris ad alium transferre potest quam ipse haberet*.

10. In Bankton's case, the nexus of the creditor who can enforce a pecuniary real burden : see, above, para 150. On the English law, see para 140.

153. Erskine. Sir John Erskine's *An Institute of the Law of Scotland* is firmly founded on Roman law. Nevertheless, like Stair he makes no reference to the *bona fide* possessor's right of retention.¹ Also missing is any discussion of retention in commodate, although Erskine makes express reference to the *actio directa commodati* and the *actio contraria*.² As regards deposit, he states the later Roman rule that retention is not permissible.³ However, Erskine opines that this rule was only introduced to prevent retention for debts unrelated to the contract of deposit and that, given this, Scots law will allow the depositary to retain for expenses.⁴ This of course was Stair's view of the law too.⁵

Erskine's main discussion of retention, like previous writers, follows upon his discourse on compensation.⁶ He does not seek to differentiate between retention in respect of different types of property and begins with the right of a cautioner to retain debts owed to him by the principal debtor.⁷ Then he focuses on retention as a whole, writing :

"This right is most frequently pleaded by those who have bestowed either their money or their labour upon the subject sought to be retained; and it commonly arises in that case, from the mutual obligations which naturally lie upon the contractor."⁸

Once more, then, there is the idea of retention as a general doctrine of the law of obligations. Erskine sets out some practical examples.⁹ Firstly, there is the right of a law agent to retain his client's papers "till his bill of accounts be paid." Secondly, a tradesman may retain the item he has made until paid. Thirdly, a factor may retain the balance of his intromissions, until refunded of all his expenses.

The examples are similar to those of Bankton.¹⁰ Unlike that writer though, Erskine does not discuss retention in the context of security. He does not view retention of corporeal moveables as a hypothec, because for him a hypothec is where "the debtor himself retains the possession of the subject impignorated".¹¹ For writers who lived in the same era, it is striking that their definitions of hypothec are so different. It is of course Erskine's definition which is to prevail, being in line with that of Stair.¹² On the other hand the view of retention as a form of security, very much Bankton's standpoint, was in the future to become widely accepted.¹³

The last matter to refer to in Erskine's work is that like Bankton he refers to "lien" only in the context of a particular form of heritable security, the pecuniary real burden :

"The conditions and qualities with which a proprietor intends to burden his grant, ought to be expressed in the deed itself in such words as are proper to constitute a real charge or burden upon the lands; or, as it is called of late, a *lien*, a vocable borrowed from the French, signifying a tie or bond."¹⁴

Thus, it would seem beyond doubt that "lien" comes from the French language. Likewise the use of the word in this sense comes from English law. However, English law was also using it at the time to mean retention.¹⁵ Why there is no reference to this made by Erskine, as with Bankton remains a mystery.

1. Although he discusses the right to recompense here : III.1.11.

2. *Erskine*, III.1.24.

3. *Erskine*, III.1.27.

4. No authority has been found to support Erskine's conclusion, but, see *Voet*, 13.6.10 on the subject of retention in commodatum, where interesting parallels may be drawn.

5. See above, para 144.

6. *Erskine*, III.4.11-19.

7. *Erskine*, III.4.20.

8. *Erskine*, III.4.21.

9. *Ibid.*

10. See above, para 148.

11. *Erskine*, III.1.34.

12. *Stair*, I.13.14. And that of Ulpian : D 13.7.9.2.

13. For example, *Gloag and Irvine*, chapters 10 and 11.

14. *Erskine*, II.3.49.

15. See above, para 140.

154. Caselaw : 1750-1800. With the exception of the seminal *Harper's Creditors v Faulds*,¹ it is not proposed to discuss the twenty or so relevant cases in any detail here. Most concern the law agent's so-called hypothec and will be considered elsewhere.² The key issue which will be examined is the penetration of the term "lien" into Scots law. It will be recalled that along with Bankton and Erskine, Kames used the term "lien" or indeed "real lien" to mean pecuniary real burden.³ However, Kames used "lien" also as a general term for nexus, in much the same way as the English lawyer of the time.⁴ Unlike south of the border, nobody in Scotland had yet used "lien" in the sense of the nexus conferred by a right of retention.⁵

With the scene set, the case law can now be considered. As far as can be seen the first Scots case in which "lien" may be found is in the House of Lords' decision in *McDowal and Gray v Annand and Colquhoun's Assignees*⁶ in 1776. In truth the word does not appear in the judgements but in the plea of the respondents who argue that a pledge without possession amounts to a "secret lien".⁷ Thus the word here is being used to mean a security.

"Lien" makes its Court of Session debut in 1779 in *Dunlop v Speirs*⁸ in the context of a trust deed for creditors. The defenders here argued that as the bankrupt's effects were vested in the trustees "no *lien* was created over the subjects"⁹ in favour of the creditors equivalent to that created by real diligence. The pursuers in contrast argued that a "trust right creates a real lien over the subjects of the debtor in favour of his creditors, equivalent to attachment by legal diligence".¹⁰ They lost the case. Leaving the merits of the decision aside, it can be seen that "lien" is being used here to mean nexus, indeed in the context of both heritable and moveable property.

In the 1780 case of *Tait v Cockburn*,¹¹ the pleadings refer to an adjudication creating a "lien" or "real lien"¹² upon the heritage it is granted over. The next case of *Bank of Scotland v Bank of England*¹³ a year later, sees pleadings which use "real lien" in the sense of pecuniary real burden. In that same year comes *Ranking of Hamilton of Provenhall's Creditors*.¹⁴ It concerns a competition between the "lien" of a solicitor by "virtue of his right of hypothec" and the "real lien" of a heritable creditor in respect of the title deeds to some land. The final case for present consideration is *Hamilton v Wood*,¹⁵ decided in 1788. It concerned a ship and the pleadings refer to "the lien created by bonds of bottomry".¹⁶

The first thing to note about all these cases is that apart from the right of the solicitor in *Provenhall's Creditors* the cases do not concern rights of retention. The second is that most of them use "lien" in italics, which in cases from Morison's Dictionary is a good sign that a word is either Latin or some other foreign language. Thirdly, the cases concern both heritable and moveable property, although there is a definite bias towards corporeals rather than incorporeals.¹⁷ Fourthly, leaving *McDowal* aside, "lien" is being used as a synonym for nexus. Fifthly, it appears clear from the cases that the nexus which a "lien" confers is a real right upon the property in question, either a real right in security or a real right by diligence.¹⁸ Given that, *McDowal* does not really contradict the other cases. Further, if one takes the view that diligence can amount to judicial security, there is the option to bracket all the cases under a "security" heading.¹⁹ Whether this is a good option to pursue or not, it still leaves us some distance away from "lien" as right of retention.

1. (1791) Bell's Octavo Cases 440. Discussed in the next paragraph.

2. See the discussion of the solicitor's lien, below.

3. See above, paras 150, 152 and 153.

4. See above, para 152.

5. See above, para 140.

6. (1776) 2 Pat 387.

7. (1776) 2 Pat 387, 392.

8. (1779) Mor 14107.

9. At 14108.

10. At 14109.

11. (1780) Mor 14110.

12. *Ibid.*

13. (1781) Mor 14121.

14. (1781) Mor 6253.

15. (1788) Mor 6269.

16. At 6271.

17. In fact none of the cases refer directly to incorporeal property, although *Dunlop* deals with a debtor's entire estate.

18. For example a bond of bottomry, as referred to in *Hamilton* creates a real right : see *Gloag and Irvine*, p 297. This is also why the term "real lien" is used, when "real" in connection with property in English law actually is equivalent to "heritable".

19. See G L Gretton, "The Concept of Security", in D J Cusine (ed), *A Scots Conveyancing Miscellany*, (1987), p 126.

155. *Harper's Creditors v Faulds* (1791) Bell's Octavo Cases 440. The decision of the Whole Court in this case is undoubtedly one of the most important in this entire area of law. The facts of the case are straightforward. Faulds was a bleacher. Harper regularly sent him linen to be bleached. The account between the two was settled annually at Candlemas. However, Harper became bankrupt. Faulds sought to retain the linen which he had presently in his hands for the entire balance of the account. Harper's trustee in sequestration argued that he could only retain it for the amount due for bleaching that particular linen itself.

The comprehensive report of the case allows the arguments to be examined in detail. The basic argument for the bleacher is that Scots law following Roman law recognised a general right of retention in favour of one person possessing the property of another, that is a right of retention good for all sums owed by the other to him.¹ Retention operates in the same way as compensation, the argument continues, in that it may be competently pled against all debts due, although compensation itself is naturally restricted to all liquid debts.

Counsel for the bleacher makes extensive use of Voet as an account of the civil law, using him as authority for the proposition that only in special cases, such as in deposit and commodate was the right of retention denied.² Heavy reliance is placed on the fact that a Roman pledgee could retain for all sums.³ Kames, Stair, Bankton, and Erskine are cited, the basic proposition being that they say nothing which is contrary to Scots law admitting a general right of retention.⁴ The cases of cautioners, law agents and factors are also made reference to.⁵ Finally, it is stated that the general right of retention is good against a trustee in sequestration.⁶

The trustee in sequestration considers the bleacher's arguments for general retention and retorts :

"On examining our law, no doctrine of such evil tendency is to be found. Faulds pretends to resort to the first principles of our law; but disquisitions on the state of law, in rude and barbarous times, must depend greatly on fancy and conjecture."⁷

He begins by citing Stair's point that Scots law is against latent securities.⁸ He goes on to show that Roman law did not admit general retention and goes through our institutional writers, concluding that "nothing [there] countenances the general right contended for."⁹ Going through the Scottish cases, he argues that they show that the right of retention is restricted unless there is implied consent by the parties to the contrary, such as in the case of the factor.¹⁰

1. (1791) Bell's Octavo Cases at 433-434.

2. At 434-436.

3. At 437-438.

4. At 439-440.

5. At 440-444.

6. At 449-450.

7. At 451.

8. *Ibid.*

9. At 456.

10. At 456-457.

156. *Harper's Creditors v Faulds* : the judgements. Three of the judges agree with the bleacher on the basis that retention operates in as wide as fashion as compensation. In the words of Lord Swinton :

"Compensation and retention are the same; with this variation, that compensation can be proponed only in liquid claims, retention takes place whether the claims be illiquid or not."¹

The Lord Justice-Clerk also finds for the bleacher, but only on the basis that Harper, the owner of the linen, had become bankrupt :

"Retention, and a general count and reckoning, would be a bar to the proper conducting of business; but it is a rule of natural justice, that where bankruptcy happens, this plea must be received : the expediency that denied it in the former case has then no existence."²

The majority of the court, however, disagree and find for the trustee in sequestration.³ A highly erudite judgement is delivered by the Lord President, Sir Ilay Campbell. He states that retention comes from the civil law and defines it as :

"A right of refusing delivery of a subject, till the counter-obligation under which the subject was lodged, be performed."⁴

He finds no authority in the civil law for general retention and states that the principles which regulate the retention of the factor and the cautioner do not apply to other contracts.⁵ He disagrees with the view of the Lord Justice-Clerk.⁶ Further, he shows that there are clear policy reasons for not allowing general retention :

"Retention is a more extensive and dangerous right than compensation, where bankruptcy occurs. Compensation operates *retro*, and a balance is struck, for which alone the creditor can rank. Retention, is different, it does not extinguish *pro tanto*, leaving the creditor to rank merely for the balance, but

he retains the subjects, and, instead of ranking for the balance, ranks for the whole debt until he is paid up, either by his dividend, or by that joined with the produce of his collateral security."⁷

The reason here seems convincing. As regards the decision in *Harper v Faulds*, on a wider level, it is one which coheres with our own examination of the civil law and institutional sources. What was found there was that the right of retention was a defence generally available within the law of obligations and not limited to a fixed list of contracts as in English law.⁸

However, the retention allowed was retention until the performance of a reciprocal obligation. For example, under a contract of commodate the subject could be retained until the borrower's expenses in respect of that subject were met. There was no general retention for all sums due by lender to borrower. Certain exceptions existed, of course such as the Roman pledgee under the *pignus Gordianum*.⁹ Scots law also has certain exceptions, such as the retention of the factor.¹⁰ However, these are very much exceptions and consequently the decision of the majority in *Harper* must be viewed as correct.

1. (1791) Bell's Octavo Cases 440 at 467.

2. At 471.

3. The judges are Lords Stonefield, Hailes, Gardenston, Ankerville, Dunsinnan and Dreghorn, and the Lord President.

4. (1791) Bell's Octavo Case 440 at 471.

5. At 474.

6. At 473 he states : "Bankruptcy can make no difference, the case is the same after bankruptcy as before it, the property is in the creditors, so far as not excluded by a lien."

7. At 474.

8. See above paras 136, 137, 144, 148, 152 and 153.

9. See above, para 126.

10. See *Bankton*, I.24.34; *Erskine*, III.4.21.

157. *Harper's Creditors v Faulds* : use of "lien". It is important to make note of how "lien" is used in this very important case. Where the word is found in the pleadings and the judgements it is used to mean the nexus created by a real security on a piece of property.¹ Thus the use is consonant with the use made in earlier Scots case law.² In fact the form often used here is "real lien", which underlines the idea of real right, but is probably in fact a mistake for "real lien" was a contemporaneous term of English law for security over land.³

The way in which "lien" relates to right of retention sees a difference of opinion between the two judges who use the word, the Lord President and Lord Dreghorn, both of whom found for the trustee-in-sequestration. Lord Dreghorn opines :

"Retention is not a pledge, nor a lien, but the mere result of possession : since, if an artificer loses possession, he loses his right of retention, even for expenses; nor can he recover possession as in a lien, where he has an *actio in rem*."⁴

In sharp contrast, Sir Ilay Campbell states :

"For the expense of bleaching he [the bleacher] has a real right, a lien, which entitles him to refuse delivery to the owner, or to any one in his name, till paid his expence."⁵

For the reasons discussed fully elsewhere it is felt that the Lord President is correct.⁶ The point to take away from here, however, is that this appears to be only the second time in Scotland that a right of retention is referred to as being a lien.⁷ It is none the less clear that it is not being said that "lien" and "right of retention" are interchangeable terms. Rather, and this is clear also in another part of the Lord President's judgement, a right of retention is an example of a lien.⁸ Thus he and Lord Dreghorn are at one on the meaning of "lien", but they disagree on whether a right of retention counts as such. In 1791 therefore, as in 1749 with Bankton, "lien" in Scotland meant something different from what it means today.

1. (1791) Bell's Octavo Cases 440 at 437, 438, 447, 463, 464, 465, 472 and 473.

2. See above, para 154.

3. See *Bankton*, as discussed in para 150 above.

4. Above, note 1 at 464-465.

5. *Ibid.* at 472.

6. See, below, paras 193-197.

7. The only previous time being in the pleadings of *Ranking of Hamilton of Provenhall's Creditors* (1781) Mor 6253, in respect of the right conferred by the law agent's hypothec, as then called.

8. At 473 he states : "It would be singular, that what was not in any view a lien before bankruptcy, should, at the moment of bankruptcy, be converted into one."

(f) Scots law from 1800 to the present

158. George Joseph Bell. It is with a sense of anticipation that the works of Bell are approached, for he is the man who is widely credited with, and sometimes criticised for, the introduction of lien into Scots law.¹ The earliest of Bell's works relevant here is his *A Treatise on the Law of Bankruptcy in Scotland*. The first volume was published in 1800 and the second in 1804. The work was to appear in six subsequent editions, but under the new name of *Commentaries on the Law of Scotland and on the Principles of Mercantile Jurisprudence*.² It is fair to say that his treatment of retention/lien follows the same plan in all these editions, but it is of course the earliest one which is of primary interest. In the second volume Bell discusses the various types of security effective in bankruptcy. One of his headings is :

"Of securities of the nature of real right resulting from possession."³

Under that heading he writes :

"The securities includable under this class correspond with the set-off and equitable liens of the English law; the terms used in this country are compensation and retention."

Once again, we have an institutional writer dealing with compensation and retention in the same part of his work. But there are differences here. Bell discusses retention before compensation. More importantly, he deals with these doctrines in terms of

securities rather than in terms of liberation from obligations. Only Bankton came anywhere near to such an approach.⁴ A further key thing here is Bell's direct equation of our doctrines with those of English law. In some ways this is not a happy equation, for even at the time when he wrote there existed a category of rights in English law, now universally referred to as "equitable liens", which cannot be equated with retention for they are non-possessory.⁵

Under the sub-heading "Of the doctrine of retention or lien", Bell states that liens or rights of retention are either special or general. A special lien secures only the debt under a particular contract whereas a general lien secures the whole balance of debts due by the proprietor to the possessor of the goods. He goes on to say that in both the case of special and general retention "the security and real right depends entirely on the fact of possession". Once again the point that retention or synonymously lien is a security is driven home, here in very much civilian terminology. There follows further discussion on the type of possession needed to found a lien.

Under a further sub-heading "Of Specific Liens", Bell states that in any contract a special lien can arise through the doctrine of mutuality of obligations. Thus for example, a bleacher may detain cloth he has whitened and a carrier a commodity he has delivered until paid. Under the sub-heading "Of General Liens", Bell enters into a discourse upon the relevant English law on the matter, including the matter of how general liens can be created expressly. In terms of Scots law, he discusses the "Writer's retention", the "Factor's lien", the "Broker's lien", the "Lien to trustees" and the "Cautioner's lien". He then goes on to look at compensation.⁶

1. See, for example, G L Gretton in "The Concept of Security" in D J Cusine (ed), *A Scots Conveyancing Miscellany*, (1987), p 126 at p 144; E Marshall, *Scots Mercantile Law*, (2nd ed, 1993) at para 7-120.

2. See D M Walker, *The Scottish Jurists*, (1985), pp 338-345.

3. G J Bell, *A Treatise on the Law of Bankruptcy in Scotland*, vol 2, (1804), p 362.

4. See above, para 149.

5. See above, para 140.

6. *Op cit* n 3 at p 365.

159. Analysis. Some comments have already been made as Bell's work has been reviewed, but a fuller analysis will now be attempted. An appropriate place to start is Bell's use of "lien". He uses it as a direct synonym for possessory retention. This indeed was the principal use of the word in English law at the time, within the general context of nexus.¹ However, with only a couple of exceptions,² Bell is the first Scottish authority to use the word in terms of retention. It is very much a novel approach, for it goes against the grain of contemporary Scots usage. The Scots lawyer of the time was using "lien" as a general term for nexus.³ So too were statutes applying to Scotland.⁴ If there was a more specialised use of the word, it came in the shape of "real lien", a term used by David Hume, Walter Ross and conveyancers at large for the heritable pecuniary real burden.⁵

In fact Bell pointedly moves away from the Scottish usage of the time. He does not refer to "real liens" when discussing real burdens, unlike Bankton, Kames, Erskine, Hume and Ross.⁶ Only on one occasion in his works does he use "lien" simply to mean nexus, when he writes in his section on diligence that "Arrestment in execution was a lien created by attachment."⁷ Rather when Bell uses "lien" he means pure and simply retention based on possession. In this light, it is right to say that Bell anglicised the Scots terminology of retention. To be fair, he uses "retention" as many times as he does "lien", but over the coming decades the latter term gained ascendancy in Scotland.⁸

We turn now to the matter of "special liens" and "general liens". Such a distinction had never previously been made by a Scottish writer and the way in which Bell sets the matter out leaves little doubt that he has been studying the contemporary English law. Nevertheless, it would seem that there is a certain validity in applying the distinction in Scots law. For whilst special retention is the normal rule, it seems that our common law recognises general retention in the cases of the cautioner, factor and law agent.⁹

Bell's discussion of the possession requisite to found a lien is clearly based on English law.¹⁰ However, his discussion of special liens is in contrast very much Scottish. Special retention is seen as a right which is not confined to specific contracts, but as something founded on the doctrine of mutuality of obligations.

As regards general retention, there is much reference to English law here. But with the exception of the broker's lien, Bell cannot be accused of having no relevant Scottish authority to show that the examples of the general liens which he gives are in fact recognised by Scots law. There are, however, clear conceptual difficulties with his last two examples, the lien to trustees and the cautioner's lien. Trustees own trust property and thus their right of retention is based upon ownership and not possession, which Bell has said is the foundation of lien.¹¹ As regards cautioners, all the case law involves the retention of debts and debts being incorporeal cannot be possessed. The cautioner's lien therefore is a different species of retention from the right of a law agent to detain his client's papers.

A general verdict on Bell's treatise of 1804 is that in the writing of it he is not in fact guilty of the wholesale introduction of an alien concept (lien) into Scots law. Rather, what he can be accused of is taking the comparable English law and using it to embellish the Scots law of retention already existing. Unsurprisingly this methodology works better in some places than it does in others. For example his realisation that Scots law recognises general retention in certain places, like English law, is perceptive and accurate. The way in which he uses "lien", on the other hand, conflicts with contemporary Scots case law.¹²

Bell's emphasis on retention or lien as a form of security is important as this view is now generally accepted, although the importance of the doctrine within the law of obligations as recognised by Stair *et al* is still appreciated.¹³ In reality Bell's treatment of lien is no less than the foundation of the modern law in this area.¹⁴ By way of criticism, the principal things lacking from it are a conception of the particular types of property over which retention may be exercised and more crucially a differentiation between retention based upon ownership and that based on a lesser title.

1. See above, para 140.

2. *Ranking of Hamilton of Provenhall's Creditors* (1781) Mor 6253; Lord President Campbell in *Harper's Creditors v Faulds* (1791) Bell's Octavo Cases 440 at 472.

3. See the cases cited in para 154.

4. See the Payment of Creditors (Scotland) Act 1793 (c 74) ss 33 and 39 and the Payment of Creditors (Scotland) Act 1814 (c 137), ss 42 and 50.

5. See Hume, *Lectures*, vol IV, chapter 9; Walter Ross, *Lectures on the History and Practice of the Law of Scotland relative to Conveyancing and Legal Diligence*, vol 2, (1792) and (2nd ed, 1822), at p 414 *et seq*; *Martin v Paterson* 1808, June 22 FC; *Brown v Miller* (1820) 3 Ross LC 23.

6. Bell, *Commentaries*, (7th ed), 1,726-732.

7. Bell, *Commentaries*, (7th ed), 1,6.

8. See *Gloag and Irvine*, chapter 10.

9. See *Erskine*, III.4.20-21. However, the cautioner's right is in respect of debts and rests on *dominium*.

10. He relies on English authority, for example, *Kinloch v Craig* (1789) 3 TR 119; 100 ER 487.

11. Although, there is confusion liable to arise here as trust was formerly seen as mere deposit : see *Stair*, I.13.8.

12. See above, para 154.

13. See, for example, W M Gloag, *Contract*, (2nd ed, 1929), chapter 35.

14. Being relied upon by later writers, for example A J Sim, *SME*, vol 20, paras 36 *et seq*.

160. Bell's later works. As previously stated, Bell's *Treatise on Bankruptcy*, in the revised form of his *Commentaries* went to seven editions. The later editions mainly contain new developments in the law. There are, however, some areas of retention/lien where Scots law is showing no sign of development so Bell does in fact carry out a wholesale importation of some English law. Two cases are particularly important. In the second edition of his *Commentaries* he introduces the banker's lien to Scotland.¹ He states it to be a general lien. There is no Scots authority cited, but simply a sheepish statement that "bankers are in the nature of money-factors".² Thus the reader is asked to perform a deductive syllogism. Factors have a general lien in Scotland. Bankers are money-factors. Thus bankers have a general lien in Scotland. And indeed nobody has dissented from the conclusion.³

The other instance comes in the third edition of his *Commentaries*, where the innkeeper's lien is introduced into Scots law. It is found in his section "Of special liens". Bell's strategy here is to set out the relevant English law and then end with :

"In Scotland, I think lien would be given on the broad principle, that it is the resulting security for the *actio contraria* in all cases."⁴

This approach is liable to engender problems for it throws together the generalist civilian doctrine of retention arising out of mutual obligations with the idiosyncracies of the English innkeeper's lien. The matter is addressed fully elsewhere.⁵

Bell's other great work was his *Principles of the Law of Scotland*, first published in 1829, which went to ten editions.⁶ It contains a chapter entitled "Of retention or lien", following upon a chapter on pledge and hypothec.⁷ Compensation is treated in a completely different part of the work,⁸ lien being seen squarely as a form of security. His detailed treatment of the matter follows the same pattern as in his *Commentaries* and nothing therefore needs to be commented upon it further here.⁹

1. Bell, *Commentaries*, (2nd ed, 1810), p 488.

2. *Ibid.*

3. The proposition that Scots law recognises a general lien in favour of bankers was roundly endorsed in *Robertson's Tr v Royal Bank of Scotland* (1890) 18 R 12. See below, para 245.

4. Bell, *Commentaries*, (3rd ed), (vol 2, 1819), p 147.

5. See below, paras 223-226.

6. The last edition in Bell's personal hands was the 4th edition of 1839. Bell died in 1843.

7. The chapter is found at sections 1410-1454 in the 10th edition.

8. Bell, *Principles*, (4th and later editions), ss 572-575. At para 1410 he does, however, distinguish retention from it.

9. In essence he deals with the requisite possession followed by special then general retention.

161. Other nineteenth century developments In the same way, as the law of pledge post-1681 can be said to be a unified body of rules, it is fair to say that the law of lien after the work of George Joseph Bell falls into the same category. Thus only a brief overview of the development of the area is needed.

Dealing firstly with terminology, the word lien as used by Bell slowly but surely embeds itself into Scots law.¹ This may be seen in the particular context of bankruptcy legislation, where "lien" had formerly been used as a synonym for security in general.² In the specific area of the law agent's right of retention the word

"hypothec" does continue to be much used.³ Further, "real lien" remains widely used in the context of the pecuniary real burden upon land.⁴

In terms of legal writings, the earliest of significance is David Hume's *Lectures*. His discussion of retention is heavily reliant on Bell, but in some ways retrograde in that it falls within his treatment of obligations in a chapter entitled "Extinction By Compensation and Retention".⁵ In the middle of the century there comes Professor More's famous note on retention in his edition of Stair's *Institutions*,⁶ as well as a useful chapter on the solicitor's right of retention in Begg on *Law Agents*.⁷ There is, unsurprisingly, a very full treatment in Gloag and Irvine's magisterial *Law of Rights in Security* (1897) in two chapters, entitled "Retention or Lien" and "Particular Liens".⁸ Written by Gloag, they show the clear way in which retention operates as a security.

As regards the development of the law, the middle part of the century sees the courts setting out firmly the distinction between retention based on ownership and retention based on mere possession or custody, otherwise known as lien.⁹ This is an area on which Bell himself could have been much clearer.¹⁰ Further, the distinction is one which David Hume and Professor More both miss.¹¹

The century also sees the appearance of cases in areas where Bell said that Scots law recognised a lien, but in fact there previously had been no judicial authority. Examples include cases on the banker's and broker's lien.¹² Also seen is judicial approval of express general liens, an area which Bell discussed upon the basis of English law, but on which the law of Scotland had previously been silent.¹³ This all raises the interesting "what if?" question in regard to how the law would have developed if Bell had never taken to legal writing.

1. See, for example, *Skinner v Paterson* (1823) 2 S 554; *Laurie v Black* (1831) 10 S 1 and *Paton v Wyllie* (1833) 11 S 703. Not everybody was happy about this : for example, Lord Ivory in *Hamilton v Western Bank* (1856) 19 D 152, 156 said : "In this [area] there has been a good deal of confusion introduced into our practice from a loose and not correctly discriminating use of the phraseology and doctrines of English law."

2. Compare the Payment of Creditors (Scotland) Act 1793 (c 74), ss 33 and 39 and the Payment of Creditors (Scotland) Act 1814 (c 137), ss 42 and 50 with the Bankruptcy (Scotland) Act 1839 (c 41) s 3 and the Bankruptcy (Scotland) Act 1856 (c 79), s 4.

3. Even late in the century : see *Morrison v Watson* (1883) 2 Guth Sh Cas 502.
4. For example : *Brown v Miller* (1820) 3 Ross LC 29; *Wilson v Fraser* (1824) 3 Ross LC 23 and *Tailors of Aberdeen v Coutts* (1840) 1 Rob 296.
5. Hume, *Lectures*, vol III, (Stair Soc vol 16, ed G C H Paton), pp 46-59.
6. Notes to Stair, *Insitutions*, cxxxi.
7. *Begg*, chapter 15.
8. Chapters 10 and 11.
9. See below, para 199; *Brown v Sommerville* (1844) 6 D 1267; *McIrose and Co v Hastie* (1851) 13 D 880; *Laurie & Co v Denny's Tr* (1853) 15 D 404 and *Wypers v Harveys* (1861) 23 D 606.
10. The treatment of the trustee's and cautioner's lien in the same context as the other lien makes matters confusing. However, in his discussion of the trustee's lien over the heritable estate he states that it is good for all sums, but that this "is only part of the more comprehensive doctrine [of retention based on ownership] already alluded to in treating of securities by absolute disposition" : Bell, *Commentaries*, II, 117-118. More generally, see Bell, *Principles*, s 1431 : "It has sometimes been contended that in Scotland the [general] right of retention goes further than the English lien, so as to comprehend all cases where there is legitimate possession and a debt due to the possessor . . . But there is no ground for this distinction."
11. See Hume, *Lectures*, III,56-57. On More, see *Gloag and Irvine*., pp 329 and 354.
12. *Robertson's Tr v Royal Bank of Scotland* (1890) 18 R 12 (banker's lien); *Wilmot v Wilson* (1841) 3 D 815 (broker's lien).
13. *Anderson's Trs v Fleming* (1871) 9 M 718.

162. The twentieth century. This century has seen a consolidation of the developments of the last. There has been little fundamental academic writing, with most of those who have written on the subject setting out broadly similar statements of the law.¹ Bell remains very influential.² However, the term "real lien" has made a consistent indeed successful struggle for survival. It remains used as an alternative expression for the pecuniary real burden, even in an Act of Parliament³. This is despite the fact that being an importation from England the "real" refers to land and not a *jus in re*.⁴

The case law has come steadily, unlike pledge where it has somewhat dried up. This is a result perhaps of lien being of greater commercial importance.⁵ Despite having more decisions to be able to consider and throw light on apparent lacunae and inconsistencies, it remains fair to say in Professor Gretton's words of 1987 that the

law of lien is still in a "chaotic state".⁹

1. See W M Gloag, *Encyclopaedia*, vol 9, sv "Lien"; A J Sim, *SME*, vol 20, paras 66-100; D M Walker, *Principles of Scottish Private Law*, (4th ed, 1989), vol 3, pp 399-405; W A Wilson, *The Scottish Law of Debt*, (2nd ed, 1991), pp 94-97; D L Carey Miller, *Corporal Moveables in Scots Law*, (1991), paras 11.15-11.16 and 11.20-11.21; E A Marshall, *Scots Mercantile Law*, (2nd ed, 1992), p 475-488.

2. Being much cited by the writers in note 1.

3. See the Glasgow Streets, Sewers and Buildings Consolidation Order Confirmation Act 1937 (1 Edw VIII & Geo VI c xlili), s 236(1), discussed in *Pickard v Glasgow Corporation* 1970 SLT (Sh Ct) 63 and *Sowman v City of Glasgow DC* 1985 SLT 65. See also *Anderson v Dickie* 1915 SC (HL) 79; K G C Reid, "What is a Real Burden ?" 1984 JLSS 9 and the deed of conditions in J M Halliday's *Conveyancing Law and Practice*, Vol II, (1986), at p 171.

4. See above, para 150.

5. See the next paragraph. Pledge is seldom used commercially, for it means that the debtor is denied possession of his assets, making it difficult to run a business. See above, para 50. Many of the lien cases involve insolvency : for example, *Liquidator of Grand Empire Theatres v Snodgrass* 1932 SC (HL) 73; *Garden Haig-Scott & Wallace v White* 1962 SLT 78 and *National Homecare Ltd v Belling & Co* 1994 SLT 50.

6. In "The Concept of Security" in D J Cusine (ed), *A Scots Conveyancing Miscellany*, p 126 at p 144.

3. THE ECONOMICS OF LIEN

163. Value of lien. In the first place, lien acts as an effective security because of its frustrating effect on the party whose goods are subject to this right.¹ As Bell states :

"The effect of lien is to deprive the owner, or those in his right, of the use and benefit of the subject till the debt be paid for which it is retained."²

For example, B puts his car into the garage to be repaired. The work is carried out. If the garage simply let B take the car away he may take weeks to pay. If on the other hand they refuse to release the vehicle until they are paid, B will most likely promptly discharge his debt. Otherwise, he is left with the nuisance of not having the facility of his car.

The value of a lien to its holder is enhanced by the fact that it is a right which is good in insolvency.³ To continue the example from above, if B should be

sequestered the garage will have a far greater chance of recovering the entire debt he owes, provided they have retained the car. If they have released the car they have no security and consequently will rank as an unsecured creditor. But if they are detaining it, B's trustee in sequestration will have to make good the debt before he can get his hands on the vehicle. The general approach of the courts to liens in insolvency has at times proved rather benevolent. In one important case, a bleacher who had an express general lien over each parcel of goods sent to him, was held entitled to retain goods delivered within sixty days of the sequestration of his customer.⁴ The rationale of the court was that the goods were sent in the ordinary course of business therefore the lien did not amount to an unfair preference.

Leaving insolvency aside, a lien will also prevail over diligence.⁵ Thus if another of B's creditors was to arrest the car in the garage's hands, his right would be subject to that of the garage. Liens which are implied by the law have the further advantage that they prevail over any floating charge attaching to the property.⁶

Lien is a security which is very much alive in terms of modern commerce. Businesses are still using carriers, bankers, brokers, solicitors and accountants as much as they did in the last century. Questions regarding the efficacy of these and other individuals' liens still require regular resolution by the courts both north and south of the Scottish border.⁷

1. For example, of the law agent's lien Sheriff Johnston in *Duffy's Trs v A B & Co* (1907) 23 Sh Ct Rep 94, 99 states : "It is often said that the value of that lien consists in the inconvenience which want of the papers may cause". This is particularly true of this lien as the papers never may be sold to realise the security : see Lord Curriehill in *Ferguson & Stuart v Grant* (1856) 18 D 536 and below, para 271.

2. Bell, *Commentaries*, II,91.

3. Bankruptcy (Scotland) Act 1985 (c 66), s 73(1).

4. *Anderson's Tr v Fleming* (1871) 9 M 718. The sixty day rule was set down by the Bankruptcy Act 1696 (c 5). It was extended to six months by the Companies Act 1947 (c 47), s 115(3). This remains the period under the present legislation : Bankruptcy (Scotland) Act 1985 (c 66), s 36.

5. See Bell, *Commentaries*, (2nd ed), p 474; (7th ed), II,60.

6. Companies Act 1985 (c 6), s 464(2).

7. Some recent cases include *Bon Accord Removals v Hainsworth* 1993 GWD 28-1785; *National Homecare Ltd v Belling & Co Ltd* 1994 SLT 50; *DTC (CNC) Ltd v Gary Sargent & Co* [1996] 2 All ER 369 and *Ismail v Richards Butler (a Firm)* [1996] 2 All ER 506.

164. Equitable control of lien by the courts. A lien is a right the exercise of which may be subject to the intervention of the courts.¹ Take this example. C puts his surfboard in for repair to an outfit carrying out such work. The charge is not discussed. C returns three days later to find that the outfit has charged him £10,000 for the job and will not release the board until he pays up. C is likely to feel aggrieved and will rightly explore the possibility of a judicial remedy.

The approach of the courts in such circumstances was set out in a case on the solicitor's lien over his client's papers.² Lord President McNeill stated :

"[The] question arises, whether the right to retain the papers is not subject to the equitable control of the Court - whether the Court can prevent the abuse of that right of hypothec. I think the court has the power to do that, and has frequently exercised that power."³

In the words of Lord Deas, the right of retention must not be used "unfairly and oppressively".⁴ A good example of the courts exercising their power is that of *Garscadden v Ardrossan Dry Dock Co Ltd*.⁵ There a shipbuilding company was exercising its lien over a vessel for repairs. A dispute, however, arose with the owner over the amount due and in the meantime he raised an action for delivery of the ship. The court ordered the shipbuilders to release it on him consigning the balance of the account due in the Sheriff Court. Lord Ardwall stated that it was "plainly undesirable that this ship should be detained longer in the dock than is necessary".⁶

In limited circumstances the court will order the lifting of the lien if the debtor simply finds caution for the debt.⁷ If the lien-holder has no valid claim he will be ordered to return the property forthwith.⁸

Returning to the example of the surfboard the court would not allow the repairing outfit to act so oppressively. They would probably order the board's release on C

making payment for the work done assessed at *quantum meruit*.

1. In the words of W M Gloag, *Encyclopaedia*, vol 9, para 462 : "Lien is an equitable right, to which the Court, in special circumstances, may refuse to give effect". See also *Shepherd's Trs v Macdonald, Fraser & Co* (1898) 5 SLT 296.

2. *Ferguson and Stuart v Grant* (1856) 18 D 536.

3. At 538.

4. At 539.

5. 1910 SC 178.

6. At 180. See also *Mackenzie v Steam Herring Fleet Ltd* (1903) 10 SLT 734; Bell, *Commentaries*, II,93. On a lien being removed on consignation of the amount due in a non maritime case, see *Fyfe v Weir & Robertson* (1902) 18 Sh Ct Rep 9 (law agent's lien).

7. *McCulloch v Pattison* (1794) unreported, (see Bell, *Commentaries*, II,105; *Ferguson & Stuart v Grant*, at 538 per Lord President McNeill and Lord Curriehill and 539 per Lord Deas. Compare *Wilmot v Wilson* (1841) 3 D 815.

8. In *Garscadden*, above, the shipbuilders also claimed a right of lien in respect of possible future expenses. The court held that they had no such right.

4. THE OBLIGATION SECURED

165. A valid obligation. A lien, like any other security, will only exist so long as the obligation which it secures is valid and outstanding.¹ If there is no obligation owed by the owner of the property in question to the party detaining it, there can be no lien.² The position is the same if the detaining party considers that an obligation is owed but in fact that obligation is invalid or unlawful. In this situation, he will be liable in damages.³ The criminal law may also punish him, because in certain exceptional circumstances an intention to deprive a person temporarily of his property will constitute the *mens rea* for theft.⁴ A charge of extortion is also a possibility.⁵

In the well known recent case of *Black v Carmichael*⁶ cars parked on a piece of private land were being clamped. The owners were made to pay a fee before their vehicles were released. The matter attracted the attention of the local procurator fiscal and the individuals doing the clamping were prosecuted for theft and

extortion. They were found guilty and the Court of Criminal Appeal subsequently upheld the convictions. Lord Justice-General Hope stated :

"The only means which the law regards as legitimate to force a debtor to make payment of his debt are those provided by due legal process. To use due legal process, such as . . . a right of lien or retention available under contract . . . is no doubt legitimate. . . But it is illegitimate to use other means, such as . . . the unauthorised detention of the debtor's person or his property, and it is extortion if the purpose in doing so is to obtain payment of the debt."⁷

As there was no pre-existing contract between the clampers and the car owners, in the eyes of the court there obviously was going to be no valid lien here. An earlier case illustrates the same point.⁸ The owner of a television set gave it to another party for a free estimate in respect of repairs. Without any instructions, that party repaired the set and sought to retain it until his bill was met. He was charged with and convicted of theft in the Sheriff Court. The Court of Criminal Appeal upheld the conviction, agreeing with the sheriff that the accused was "indeed holding the television set to ransom".⁹

1. See *Gloag and Irvine*, p 340; *Ogilvie and Son v Taylor* (1844) 12 D 266.

2. *Walker v Phin* (1831) 9 S 691; *Ridley v Sloan* (1837) 15 S 469; *Stephen & Sons v Swayne and Bovill* (1861) 24 D 158; *Garscadden v Ardrossan Dry Dock Co Ltd* 1910 SC 178; *Lamonby v Foulds Ltd* 1928 SC 89; *McNair & Co v Don* (1932) 48 Sh Ct Rep 99; *Carntyne Motors v Curran* 1958 SLT (Sh Ct) 6.

3. *McNair & Co v Don* (1932) 48 Sh Ct Rep 99.

4. *Milne v Tudhope* 1981 JC 53; *Kidston v Annan* 1984 SLT 279; 1984 SCCR 20. Cf *Herron v Best* 1976 SLT (Sh Ct) 80. This is not the law in England where a permanent intention to deprive is required : *Arthur v Anker* [1996] 3 All ER 783.

5. *Black v Carmichael* 1992 SLT 897.

6. 1992 SLT 897.

7. At 900.

8. *Kidston v Annan* 1984 SLT 279.

9. At 280.

166. Type of obligation. Liens invariably secure the payment of a monetary debt, for example a hotel bill, the account of a solicitor or carriage charges. There seems no reason why in specific circumstances the performance of an obligation *ad factum praestandum* should not be secured. Erskine seems to admit this when he says that there may be retention until "he who pleads it obtains payment or satisfaction for his counter claim".¹ Bell's widely accepted definition of retention based on possession ie lien is also supportive :

"Retention may be described as a right to retain a subject legitimately in one's possession until a debt shall be paid, or an engagement performed, the *jus exigendi* of which is in the possessor."²

The case of *Kerr v Dundee Gas Light Company*³ might perhaps be further authority here, although the judges do not make express reference to lien. There, a builder entered into a contract to erect a gas-holder tank on the ground of his employers. He commenced the work bringing materials and tools on to the site, but subsequently became bankrupt and the contract was abandoned. It was held that the employers could retain the materials in order to complete the work subject to a claim for the value of them. Further, by a majority, it was held that the tools could be retained for use in the execution of the contract, subject to a claim for their return on the completion of the work, and reasonable remuneration for their use.

Now, the right to retain and use the materials can not be a lien, for the essence of a lien is that the property is returned on performance of the obligation secured. The materials were being permanently attached to the employers' ground.⁴ However, it is arguable that the right over the tools is a lien securing the performance of the contract. In the words of Lord Justice-Clerk Inglis, the tools were to be "returned . . . as soon as the works were executed, and the contract obligation fulfilled by their means."⁵

The peculiarity here is that a lien does not normally confer a right of use in respect of the property being retained.⁶ If the judgement had been that the property could be retained until the builder's trustee in sequestration performed the contract, then there would be no conceptual difficulty. But rather the fact that it was the retaining party who could go ahead and complete the work makes the right of retention a *sui*

generis one, perhaps better analysed in terms of an equitable right arising on bankruptcy. Further, the dissenting view of Lord Cowan that the possession of the tools was with the bankrupt, and not his employers, commends itself to the present writer.⁷

1. *Erskine*, III.4.20.

2. Bell, *Principles*, s 1410. Adopted by J Graham Stewart, *Diligence*, (1898), p 173.

3. (1861) 23 D 343. I am grateful to Mr W James Wolffe for his thoughts upon this case.

4. See particularly Lord Benholme at 350.

5. At 349. Certainly it appears to be the view of *Graham Stewart*, p 173 that the case concerns lien.

6. It confers merely a right to detain.

7. See Lord Cowan at 349-350. However, his Lordship somewhat changes his mind in the subsequent case of *Moore v Gledden* (1869) 7 M 1016 as to what constitutes possession.

167. Basis of the secured obligation : a heresy exposed. The established view is that a lien secures only contractual obligations. Here are Gloag and Irvine :

"A right to retain any subject which is the property of another must be founded on possession, and must rest on contract, express or implied".¹ (my emphasis)

According to Lord Young, lien is "just a contract of pledge collateral to another contract of which it is an incident."² In the view of Professor McBryde, special lien is purely "an instance of the mutuality principle" of the Scots law of contract.³ General lien too is widely acknowledged to exist only in the context of contract. Professor Walker writes :

"In exceptional cases, however, a general right of lien is recognised, that is, a right to withhold a thing possessed under a contract in security . . . of the whole balance due under all transactions between the parties."⁴ (my emphasis).

Support for all these statements can be found in the works of George Joseph Bell.⁵ However, only the last of them is correct. For whilst a general lien is only recognised as arising exceptionally in certain cases of contract,⁶ special lien can not be confined to situations where there has been a pre-existing agreement between the parties in question. This much may be gleaned by looking down Bell's list of examples of special lien, which is found in both his *Commentaries* and *Principles*. On Bell's list appears a lien for salvage,⁷ which he describes as "a most natural and equitable right to those who, having saved the ship, cannot be compelled to deliver it up till salvage be paid".⁸ The right applies to the vessel's cargo too.⁹

Whilst it is possible to have a salvage contract¹⁰ - for example, the owner of a sunken ship contracts with a salvor to recover it - a salvage claim arises in the absence of agreement by operation of law, as does the salvor's real right of lien.¹¹ To repeat the point, no pre-existing agreement between the parties is required.¹² According to Gloag, the right of the salvor is an "exceptional" case of lien, which rests on custom of trade rather than contract.¹³ This seems flawed, as Bell does not restrict the right to professional salvors. According to McBryde, the lien is in fact *sui generis* and therefore not an exception to the mutuality principle of contract.¹⁴ This is all very well, but the truth of the matter is that the salvor's right of retention fits squarely within the accepted definition of lien as a right to retain possession of another's property until he discharges an obligation.

Scots law recognises another right to retain possession independent of contract, which none of our writers including Bell, seem to have noticed. This is the lien of a *bona fide* possessor for improvements he has made to a piece of property in the mistaken belief that it is his own.¹⁵ This right comes from Roman law. Hence the absence of a contract cannot be said to rest on custom, nor should the right be simply dismissed as *sui generis*. The truth of the matter is that the identification of this right of retention, along with that of the salvor, disproves the myth that lien is merely part and parcel of the *exceptio non adimpleti contractus*.

1. Gloag and Irvine, p 341.

2. *Miller v Hutcheson and Dixon* (1881) 8 R 489, 492.

3. W W McBryde, *Contract*, p 311.

4. D M Walker, *Contract*, (3rd ed, 1995), p 535.

5. Support for Gloag and Irvine's statement may be found in his *Principles* at ss 1411 and 1412. Support for Lord Young's statement may be found in his *Commentaries*, at II.87, when he states that retention "operates as a pledge constituted by tacit or implied consent". Support for McBryde and Walker's statements may be found in the *Principles* at ss 1411, 1419 and 1431.

6. See below, paras 236-243.

7. Bell, *Commentaries*, II.99; *Principles*, s 1427.

8. Bell, *Principles*, s 1427.

9. Bell, *Commentaries*, II.99.

10. See for example, *Otis v Kidston* (1862) 24 D 419 and *Mackenzie v Steam Herring Fleet Ltd* (1903) 10 SLT 734.

11. *Ibid*, where Bell states : "There is in such a case a personal action also; but the first and most proper remedy is *in rem*." It is now accepted that the salvor also has a maritime lien or hypothec which does not require possession : see W Guthrie's addendum to Bell, *Principles*, s 1397; *Hatton v A/S Durban Hansen* 1919 SC 154; A R G McMillan, *Scottish Maritime Practice*, (1926), p 218, but cf *Gloag and Irvine*, p 438.

12. According to Lowe in *SME*, vol 20, para 278 the maritime salvage lien is based on contract even where there is no agreement between the shipowner and the salvor. This cannot be accepted. As D R Thomas writes in his excellent contribution to *British Shipping Laws*, vol 14, "Maritime Liens", at para 571 : "The right to salvage may arise under the general maritime law or under a salvage agreement."

13. W M Gloag, *Encyclopaedia*, vol 9, para 481.

14. W W McBryde, *Contract*, p 316 fn 63.

15. See below, para 170.

168. Special lien : a doctrine of the law of obligations. The thesis being submitted here is that special lien is part of the law of obligations as a whole and not just the law of contract. Its pedigree is a good one. Stair treats retention within his title "Liberation from Obligations", as does Bankton.¹ Erskine's treatment is similar.² They all define retention in similar terms : a right to suspend performance of an obligation until a counter claim is satisfied. Whilst counter claims are most readily associated with rights under a contract, nowhere is it said within these institutional writings that retention is confined to contractual obligations.

It is submitted here tentatively that a special lien arises in Scots law if the following three criteria are met :

- (1) A holds possession or custody of the property of B;³
- (2) A has an obligation to return that property to B; and
- (3) A has a counterclaim against B which is connected to the property.

The first of these criteria is discussed in detail elsewhere.³ The basis of the second lies in the ownership of the property held. As it belongs to B, A has a duty to return it to him if B requires his property back. If, however, the third criterion is satisfied and A has a valid claim against B connected to the property, then A may exercise a lien. The submission of this thesis is that the claim is capable of arising from any class of obligation which B owes to A. In other words it may rest in contract, unjustified enrichment or delict.

1. *Stair*, I.18.7; *Bankton*, I.24.34.

2. *Erskine*, III.4.20-21, within the title "Of the Dissolution of Obligations".

3. See below, paras 177-187.

169. Lien in the context of contract. As stated before, general liens only arise in a contractual situation.¹ Contract is also the most familiar area where special lien is encountered. For example, A sends his car to the garage for repair. The garage carries out the work and becomes entitled to detain the car until A pays his bill. A special lien will only arise in a contractual situation where there are synallgamic obligations between the parties.² To be more precise, the obligation of the lienholder to return the property must be reciprocal to the obligation which he is demanding that the other party perform. Thus in our example, the duty of the garage to give A his car and the duty of A to pay his bill are mutual obligations. The theoretical basis of the lien here lies in the *exceptio non adimpleti contractus*.³

It must be noted here that a lien will not be validly constituted where detention of the property amounts to a breach of the contract under which it is claimed to arise.⁴

Thus, where a bill was sent to a banker for discount and he refused to discount it, the court held that he could not exercise a lien over the bill.⁵ Likewise, a solicitor to whom a client has given papers specifically so they will be produced in court, may not claim a lien over them.⁶

A lien will not arise under a contract if that contract excludes the possibility of a lien arising.⁷ For example, where title deeds are handed to a solicitor with an obligation to return them on demand, he may not assert a lien over them.⁸

1. See above, para 167.

2. See W W McBryde, *Contract* (1987), p 311 and below, paras 236-243.

3. See above, para 128 and G H Treitel, *Remedies for Breach of Contract*, (1988), pp 313-314.

4. Bell, *Principles*, s 1414; *Gloag and Irvine*, p 348; A J Sim, *SME*, vol 20, para 71. The same principle applies to retention of monetary sums : *Stewart v Bisset* (1770) Mor App Compensation No 2; *Middlemas v Gibson* 1910 SC 577.

5. *Borthwick v Bremner* (1833) 12 S 121.

6. *Callman v Bell* (1793) Mor 6255; *Begg*, p 211; *Gloag and Irvine*, p 348.

7. Bell, *Commentaries*, II,91; Bell, *Principles*, s 1418; *Gloag and Irvine*, p 360; Bell, *Principles*, s 1421 (ship repairer's lien); J J Gow, *The Mercantile and Industrial Law of Scotland*, (1964), p 293 (repairer's lien); *Gilfillan v Henderson* (1828) 6 S 880 (solicitor's lien); *Robertson's Tr v Royal Bank of Scotland* (1890) 18 R 12, at 20 per Lord McLaren (banker's lien); *Holmes v Stirling* (1892) 8 Sh Ct Rep 276 (solicitor's lien).

8. *Crawfurd v Hodge* (1831) 10 S 11.

170. Special lien in the context of unjustified enrichment. It would seem that there are two clear examples of enrichment liens in Scots law : that of the *bona fide* possessor for improvements and that of the salvor. Both may be viewed as special liens, for they respectively secure the claim for recompense and the claim for salvage, and nothing else.

Take first the lien of the *bona fide* possessor for improvements which comes from Roman law.¹ It is clearly an enrichment lien, for, as Bankton says, it is based upon the rule *nemo debet locupletior fieri cum alterius jactura*.² It secures the claim in

recompense of the *bona fide* possessor for necessary and profitable expenses laid out upon the property. However, voluptuary expenses are not secured.³

Unlike in Roman law, the Scottish courts have not upheld the right of retention at all times. In two cases where the lien was pled against an heir of entail and in a case where the claimant had no written title, the claimant was told to remove himself and seek recompense for his improvements thereafter in separate proceedings.⁴ However, these types of scenario would be uncommon today. Nevertheless, where a purportedly *bona fide* possessor may more likely encounter difficulty now is with the doctrine of constructive notice of the register, which the courts have developed this century.⁵ If this doctrine is strictly adhered to here, then it becomes rather difficult for a possessor to prove that he is *bona fide*.

Mr N R Whitty is sceptical about the existence of the *bona fide* possessor's lien in Scots law at all⁶ and cites the case of *Beattie v Lord Napier*⁷ in his support. There a schoolhouse was erected on a piece of land which was known by all not to be owned by the builders. The true owner sold on. Those who had done the building sought recompense and pled retention when the singular successor tried to evict them. The court found against them on both grounds. The truth, however, about *Beattie* as Professor Reid points out is that the issue of right of retention was clouded by the fact that the possessors appear to have been in bad faith.⁸ For it is settled in Scots law that *mala fide* possessors have no claim in recompense for meliorations and consequently no right of retention.⁹

The main problem here is remembering the distinction between the claim in recompense which is personal and the lien which is real. Of course it is highly arguable that the policy grounds which restrict the claim in recompense should also restrict the operation of any lien.¹⁰

The salvor's lien must be viewed too as an enrichment lien, because but for the salvor's actions the owner of the property in question would have suffered the loss of his property to the sea.¹¹ He is thus enriched by having his goods saved.

Where else does Scots law recognise enrichment liens ? In the absence of authority what must be looked for is situations within the context of unjustified enrichment

where one party's property is in the possession of another who has an obligation to return that property but also has a counterclaim in relation to the property.¹² *Negotiorum gestio* is something which comes to mind. This is where someone steps in to look after the affairs of another who at the time of intervention is unable to manage them himself.¹³ It is not difficult to imagine a situation where a lien would arise in favour of a *negotiorum gestor*.

For example,¹⁴ J owns a refrigerated warehouse in which he stores foodstuffs. J is out of the country, when the power cables serving his warehouse are blown down by a storm. K, a friend of J, who has a refrigerated warehouse elsewhere acts as a *negotiorum gestor* by removing the foodstuffs to his warehouse. In this situation, K will be allowed to retain the goods until his expenses are met by J. For here we have counter obligations : the obligation of K to return J's property and the obligation of J to meet K's expenses.

As a matter of authority, Roman law gave the *negotiorum gestor* a *ius retentionis*.¹⁵ Further, in South Africa the law is very similar. A *negotiorum gestor*, being a person who has laid out necessary expenses upon a piece of property, is entitled to a salvage lien.¹⁶ Being an enrichment lien, this gives him a real right in the property in question.¹⁷ However, it must be noted that Mr Whitty, who considers the Roman and South African authority, is of the clear opinion that no such lien is recognised by Scots law.¹⁸ It may also be noted here that the laws of France and Louisiana give non-possessionary privileges in respect of expenses laid out on conserving a thing.¹⁹

In Scotland, as has been seen, there is clear authority recognising a lien in favour of a *bona fide* possessor of land for improvements. It is submitted, that our law must also recognise a similar right in respect of *bona fide* meliorations to corporeal moveables. Indeed this is Professor Reid's view.²⁰ The right is clearly recognised in Roman law, South African law and in the law of Quebec.²¹

No doubt other examples may be found in the law of unjustified enrichment where a special lien may arise. This is an area where Scots law is open to extension.

1. On the Roman law see above, para 122. On the Scots law, see *Bankton*, I.8.15, I.9.42 and II.9.68; *Binning v Brotherstones* (1676) Mor 13401; *York Buildings Co v Mackenzie* (1797) 3 Pat 618; *Barbour v Halliday* (1840) 2 D 1279; J Rankine, *The Law of Land-ownership in Scotland*, (4th

ed, 1909), pp 89-90; W M Gordon, *Scottish Land Law*, (1989), p 418; K G C Reid, *SME*, vol 18, para 173.

2. *Bankton*, II.9.68.

3. *Bankton*, I.9.42. They are not secured because there is no claim in recompense for improvements "of a fanciful sort, or such as are suited only to the particular taste and humour of the late possessor": Hume, *Lectures*, III,171.

4. *Duke of Gordon v Innes* (1824) 3 S 10; *Vans Agnew v Earl of Stair* (1824) 3 S 229; *Sinclair v Sinclair* (1829) 7 S 342. There appears to have been a lack of good faith on behalf of the builder in the last of these.

5. See *Aberdeen Trades Council v Shipconstructors' etc Association* 1949 SC (HL) 45; *Trade Development Bank v Warriner and Mason (Scotland) Ltd* 1980 SLT 49, affd 1980 SC 74, 1980 SLT 223.

6. I am grateful to Mr Whitty for his comments. Note also his article "Indirect Enrichment in Scots Law" 1994 JR 200, 206.

7. (1832) 9 S 639.

8. *SME*, vol 18, para 173, fn 11.

9. *Erskine*, III.1.11; *Barbour v Halliday* (1840) 2 D 1279; *Duke of Hamilton v Johnston* (1877) 14 SLR 298. All of these rejected Stair's opinion that *mala fide* possessors did have a claim: I.8.6.

10. There are arguments on both sides. See N R Whitty, above, n 6.

11. Unless of course there is a salvage contract. See the preceding paragraph and *Otis v Kidston* (1862) 24 D 419 and *Mackenzie v Steam Herring Fleet Ltd* (1903) 10 SLT 734.

12. See above, para 168.

13. See W M Gloag and R C Henderson, *Introduction to the Law of Scotland*, (10th ed, 1995), para 22.31; N R Whitty, *SME*, vol 15, paras 87-143.

14. The example is very loosely based on *Kolbin & Sons v Kinnear & United Shipping Co* 1931 SC (HL) 128.

15. D 12.6.33; *Buckland*, p 538.

16. *Hochmetals Africa (Pty) Ltd v Otavi Mining Co (Pty) Ltd* 1968 1 SA 571 (SA); H S Silberberg and J Schoeman, *The Law of Property*, (3rd ed, 1992), pp 464-465; A J Van der Walt and G J Pienaar, *Introduction to the Law of Property*, (1996), p 373; T J Scott, *LAWSA*, vol 15, para 110; *Wille's Law of Mortgage and Pledge in South Africa*, (3rd ed, ed Scott and Scott, 1987), p 87; D H van Zyl, *Negotiorum Gestio in South African Law*, (1985), pp 78-80.

17. *Ibid*; *Brooklyn House Furnishers (Pty) Ltd v Knoetze and Sons* 1970 3 SA 264 (A).

18. N R Whitty, *SME*, vol 15, para 128. He points out that there exists no Scottish authority recognising a lien here. This is correct. He adds that "probably a new species of subordinate real right can only be created by the legislature." This is also correct, but the point here is that Scots law is

capable of recognising an enrichment lien in favour of a *gestor* on general principles of the law of retention, thus it is not a question of creating a new subordinate real right.

19. French Civil Code, art 2103(3); Civil Code of Louisiana, art 3217(6).

20. K G C Reid, *SME*, vol 18, para 173.

21. On the Roman law, see above para 121. On the South African law see *Savory v Baldochi* 1907 TS 524; *New Club Garage v Millborrow & Son* 1931 GWL 86; *LAWSA*, vol 15, para 112; *Wille's Law of Mortgage and Pledge in South Africa*, p 88. For Quebec, see the Civil Code of Quebec, art 974.

171. Lien in the context of delict. Delict is a less obvious place to find retention or lien operating, for it is an area which generally sees only one of the involved parties having obligations, not both of them. For example, Stevenson owed Mrs Donoghue a duty of care when producing his ginger beer.¹ She, on the other hand, had no obligation to him. Thus the key ingredients of counter obligations and one party in possession of the property of another, do not regularly present themselves in the context of delict.

It is nonetheless possible to produce a couple of statutory examples of delictual liens. Under the Winter Herding Act 1686 (c 11) the owner of "horses, nolt, sheep, swine or goats" straying on another's land is made liable, in addition to his liability for any damage done, in a penalty of half a merk for each beast, and the beasts could be retained until this and the expenses of keeping them are met.² This Act may or may have not been declaratory of the common law. Certainly the situation is ripe for the creation of a lien. On the one hand the owner of the animals has a right to get his property back. On the other hand his neighbour has a claim for damages. As he holds the animals, he may detain them until his counterclaim is met.

The Winter Herding Act has been repealed in recent years and the replacement legislation only confers a right of retention in order to prevent damage.³ It is a nice question whether a right of retention exists at common law until damages are paid for damage already caused, although obviously there is no right in respect of the fixed penalty now abolished. The new legislation of course may be seen as a complete statutory code, thus excluding such a claim.

The other statutory example is still in force and concerns ports. The provisions of most private Acts of Parliament relating to harbour authorities incorporate the terms of the Harbours, Docks and Piers Clauses Act 1847 which allow the detention by a harbour authority of any vessel causing damage to harbour works in any circumstances and the retention of vessel until security for repairs is given.⁴

In terms of hypothetical examples of where lien may arise in terms of delict, one which springs to mind is if a car crashes through a fence and lands in someone's garden. The owner of the garden arguably has a lien until he is reimbursed for the damage. No doubt there may be other examples.⁵ It is certainly the case in German law, that an individual has a lien *in personam* (*Zurückbehaltungsrecht*) where he has a claim in respect of any damage caused to him by an object which he is holding.⁶

One matter which may be considered is the fact that a delictual lien will secure a claim for damages, rather than a fixed amount of money already set down in a contract. However, the courts are happy for a lien to be exercised in order to secure the payment of damages due for breach of contract.⁷ Hence there cannot be a problem in allowing a similar exercise in respect of damages due for a liability in delict.

1. *Donoghue v Stevenson* 1932 SC (HL) 31.

2. See *Fraser v Smith* (1899) 1 F 487; W M Gloag and R C Henderson, *Introduction to the Law of Scotland*, (8th ed, 1980), p 517; J Rankine, *Landownership*, (4th ed, 1909), p 611. See also the American Law Institute, *Restatement of the Law of Security*, (1941), s 61(i), which provides a similar right.

3. Animals (Scotland) Act 1987 (c 9), s 3.

4. Harbours, Docks and Piers Clauses Act 1847 (c 27) s 74. See J A G Lowe, *SME*, vol 20, para 298.

5. It is arguable that the cars in *Black v Carmichael* 1992 SLT 897 could lawfully be detained until damages for trespass were received. However, such damages would be minimal given that all which was involved was a few hours parking, with no damage caused to the property. The levelling of a hefty fee (£45) for the wheel clamps to be removed, as was done there, would consequently still amount to extortion.

6. BGB, art 273(2).

7. See below, para 211; *Moore's Carving Machine Co v Austin* (1890) 33 SLR 613; *Marshall v Bogle* (1890) 2 Guth Sh Cas 401; *Gloag and Irvine*, p 353; W M Gloag, *Contract*, (2nd ed, 1929), p 632.

5. SUBJECT MATTER

172. **General.** According to Bell, it may be said of retention or lien that :

"Strictly speaking, it is applicable to corporeal subjects only, but is extended to debts."¹

This section examines precisely what sorts of property it is competent to have a lien upon.

1. Bell, *Principles*, s 1410. This comes within the context of the major heading "Real Rights of Property and Possession in Moveables".

173. **Corporeal moveables.** It is universally accepted that it is competent to have a lien over corporeal moveable property.¹ This is very much the type of property most readily associated with lien. The case law contains many examples, including : title deeds;² papers in general;³ ships;⁴ horses;⁵ engines;⁶ bleached goods;⁷ grain;⁸ potatoes;⁹ electrical appliances;¹⁰ household goods;¹¹ a refreshment trailer;¹² cars;¹³ and luggage.¹⁴ A lien, however, may not be exercised where this would frustrate the provisions of a statute.¹⁵ Hence a register of shareholders of a company which must be kept open for inspection at the company's registered office cannot be made the subject matter of a lien.¹⁶ It would seem clear that a company's seal and charter may not be retained either.¹⁷

1. See D M Walker, *Civil Remedies*, (1974), p 64; W M Gloag, *Encyclopaedia*, vol 9, para 475. Bell treats lien in his *Commentaries* in a chapter entitled "Of Securities over Moveables in the Nature of Real Right resulting from Possession" : II,86.

2. *Orme v Barclay* (1778) Mor 6251; *Creditors of Newlands v Mackenzie* (1793) Mor 6255; *Menzies v Murdoch* (1841) 4 D 257; *Garden Haig Scott & Wallace v Stevenson's Tr* 1962 SLT 78.

3. *Ayton v Colville* (1705) Mor 6247; *Meikle & Wilson v Pollard* (1880) 8 R 69; *Reid v Galbraith* (1893) 1 SLT 273.

4. *Barr and Shearer v Cooper* (1873) 11 M 651; (1875) 2 R (HL) 14; *Ross & Duncan v Baxter & Co* (1885) 13 R 185; *Garscadden v Ardrossan Dry Dock Co Ltd* 1910 SC 178.

5. *Miller v Hutcheson & Dixon* (1881) 8 R 489.

6. *Republic of the Sudan v Sagax Aviation Ltd* 1990 GWD 29-1681.
7. *Lesly v Hunter* (1752) Mor 2660; *Harper's Creditors v Faulds* (1791) Bell's Octavo Cases 440; *Anderson's Tr v Fleming* (1871) 9 M 618.
8. *Laurie & Co v Denny's Tr* (1853) 15 D 404.
9. *Paton's Trs v Finlayson* 1923 SC 872.
10. *National Homecare Ltd v Belling & Co Ltd* 1994 SLT 50.
11. *Bon Accord Removals v Hainsworth* 1993 GWD 28-1785.
12. *Hostess Mobile Catering v Archibald Scott Ltd* 1981 SC 185.
13. *Carntyne Motors v Curran* 1958 SLT (Sh Ct) 6.
14. *Bermans and Nathans Ltd v Weibye* 1983 SLT 299.
15. A J Sim, *SME*, vol 20, para 96; *DTC (CNC) Ltd v Gary Sargent & Co* [1996] 2 All ER 369.
16. *Liquidator of Garpel Haematite Co Ltd v Garpel* (1866) 4 M 617; *In re Capital Fire Insurance Association* (1883) 24 Ch D 408.
17. *York Buildings Co v Robertson* (1805) Mor App Hypothec No 2.

174. Incorporeal moveables. It is not very difficult to find examples of a lien being said to be conferred upon incorporeal moveable property. For example, at common law and usually also by its Articles of Association a company has a lien over shares in security of debts owed by the shareholder to the company.¹ In truth the lien here is the right to retain the money which the shares represent.² Another example is a factor being said to have a lien over the price of goods he has sold on behalf of his principal.³ Many instances of the judiciary using "lien" in the context of incorporeal moveable property may be found in our law reports.⁴

The background to such usage lies in the fact that "lien" originally came into Scots law as a term for nexus which was equally applicable to all types of property.⁵ Conceptually, however, there is a clear difference between retention of possession of corporeal moveables and retention of incorporeals such as debts. The former rests on a subordinate real right, whereas the latter rests upon *dominium*. When a person buys shares in a company they in effect transfer their money to it in return for the shares. When a factor is paid by a buyer of the goods of his principal, the price becomes the factor's. He must of course account to his principal and it is in this

process of accounting that he may retain the money until obligations owed by the principal to him are discharged.

It is felt important that the conceptual distinction be recognised by referring to cases involving retention of incorporeal property in terms of "retention" and not "lien". In many cases this usage has already been adopted. For example, the right of a tenant to retain rent until his landlord discharges his obligations in terms of the lease has always been referred to as a right of retention and not as a lien.⁶

An exception to the general rule is admitted in the case of negotiable instruments, over which it is possible to have a lien.⁷ If one takes the argument that a holder of a bill of exchange is its owner then in most cases any right of retention must be considered to be based on that ownership and therefore not to be a lien.⁸ However, a person in possession of an order bill not endorsed to them cannot be a holder and in relevant circumstances may have a lien. It must be said that the case law on negotiable instruments tends to avoid these conceptual niceties and adopts a wide usage of lien.⁹

1. *Hotchkis v Royal Bank* (1797) 3 Pat 618; *Burns v Lawrie's Trs* (1840) 2 D 1348; *Stark v Fife and Kinross Coal Company* (1899) 1 F 1173.

2. D M Walker, *Civil Remedies*, (1974), p 64.

3. Bell, *Commentaries*, II,111; *Levitt v Cleashy* (1823) 2 S 184; *Miller v McNair* (1852) 14 D 955 at 961 per Lord Medwyn.

4. For example Lord Ivory in *Dickson v Nicholson* (1855) 17 D 1011; *Brown v Smith* (1893) 1 SLT 158 ("lien" of auctioneer on price of goods sold).

5. See above, para 154.

6. See W M Gloag, *Contract*, (2nd ed, 1929), pp 628-630; W W McBryde, *Contract*, (1987), pp 310-311.

7. Bills of Exchange Act 1882 (c 61), s 27(3); *Byles on Bills of Exchange*, (26th ed), pp 226-227. For the effect of a banker's lien in relation to negotiable instruments, see Bell, *Principles*, s 1451; Gloag and Irvine, pp 372ff; *Robertson's Trustee v Royal Bank of Scotland* (1890) 18 R 12 at p 20 per Lord McLaren.

8. This is the view of Professor Gretton expressed in "The Concept of Security" in D J Cusine (ed), *A Scots Conveyancing Miscellany*, (1987), p 126, at p 144.

9. For example, *Brandao v Barnett* (1846) 12 Cl & Fin 787; 8 ER 1622; *London Chartered Bank of Australia v White* (1879) 4 App Cas 413; *Robertson's Tr v Royal Bank of Scotland* (1890) 18 R 12; *Barclays Bank Ltd v Astley Industrial Trust* [1970] 2 QB 527. See further *Shaw*, p 66.

175. Land. According to Professor Walker :

"The right of retention or lien can be exercised in respect of corporeal moveables only, not of heritage."¹

Certainly it is the orthodox view that lien is a moveable security, no more, no less.² However, this ignores the existence of the lien of the *bona fide* possessor for improvements made to land. An enrichment lien, rather a lien resting on contract, its nature has been discussed elsewhere.³ It is quite clear therefore that lien is not restricted to corporeal moveables.

There remains the question of whether there can be a lien upon land arising by agreement. On this issue Gloag writes :

"The doctrine of lien founded on possession under a contract of employment has no application to heritable property."⁴

He cites two cases to support this proposition. One concerns a tenant retaining possession after the reduction of his lease till refunded for improvements.⁵ The court held he had no right to retain. However the basis of the decision has nothing to do with the fact that land is involved, but rather that a tenant has no claim in these circumstances and consequently no right of retention either.⁶ In the other case railway contractors tried to retain possession of a railway until certain claims were met by their employer.⁷ In the opinion of the court they could not do this, as in the words of Lord Justice-Clerk Inglis their possession could only be retained "so long and to such an extent as is necessary for the performance of the contract."⁸ This can be read as being a condition peculiar to the contract in question. However, the judgements contain some dicta which seem to deny the possibility of a lien upon land.⁹

Professor McBryde, on the other hand, sees no reason why there cannot be a heritable lien based on the mutuality principle of the Scots law of contract.¹⁰ His

dismissal of the two cases above is not entirely convincing.¹¹ Of greater concern is his statement that :

"The possible objection [to the recognition of such a lien] that it is inconvenient to have latent rights affecting heritage can be met by pointing out that retention is not effective against third parties."¹²

His point is not correct. Lien is a real right and will be effective against third parties.¹³ However, the right is in fact not a latent one as it depends on possession. An unregistered servitude is arguably more latent as it only requires occasional exercise to prevent it from negatively prescribing.¹⁴ In the Land Register there exist a considerable number of rights known as "overriding interests" which do not require to be registered, and it would seem that a lien could quite easily be one of these rights.¹⁵ Registration is not the be all and end all of land law. Given this, there seems no reason why a lien should not be exercised in respect of heritable property.¹⁶ This certainly is the position in France and South Africa.¹⁷ Logically, the *exceptio non adimpleti contractus* should apply as much to immoveables as to moveables.

1. D M Walker, *Civil Remedies*, (1974), p 64.

2. Thus Bell treats lien within a chapter entitled "Of Securities over Moveables in the Nature of Real Right resulting from Possession" in his *Commentaries*, II.86. In his *Principles* the treatment falls within a section entitled "Real Rights of Property and Possession in Moveables".

3. See above, para 170.

4. W M Gloag, *Contract*, (2nd ed, 1929), p 632. See also his contribution to the *Encyclopaedia*, vol 9, para 475.

5. *Turner v Turner* (1811) Hume 854.

6. *Bankton*, II.9.68; *Erskine*, III.1.33; J Rankine, *The Law of Leases in Scotland*, p 260.

7. *Castle-Douglas and Dumfries Ry Co v Lee* (1859) 22 D 18.

8. At 23.

9. The Lord Ordinary (Jerviswoode) states at 21 : "The respondents maintain, in the first place, that they are in possession of the line, and have a right of *lien* or of retention over it, as in security of their claims . . . No authority in the law of Scotland has been referred to in support of the proposition as applied to an heritable subject as that in question". At 23, Lord Justice-Clerk Inglis states : "Any

notion of a lien or right of retention in heritable subjects of this kind is totally out of the question, and was not contended for.”

10. W W McBryde, *Contract*, (1987), pp 315-316.

11. As regards *Turner v Turner* he states that there was no right of retention because the lease had been reduced. But the law still allows a claim for recompense when a title has been reduced, in cases not involving a tenant : *Binning v Brotherstones* (1676) Mor 13401; K G C Reid, *SME*, vol 18, para 173. As regards the *Castle-Douglas Ry Co* case, he states that the contractors never had possession. What Lord Justice-Clerk Inglis in fact says is that both the contractors and the landowners have possession, but the former's title is inferior to the latter's.

12. *Op cit* n 10 at p 315.

13. See below, paras 193-197.

14. After the servitude is constituted either by possession on the basis of a writ, or by 20 years positive prescription under s 3 of the Prescription and Limitation (Scotland) Act 1973 (c 52), it need only be exercised every 20 years to stop it from negatively prescribing under s 8 of the 1973 Act.

15. Land Registration (Scotland) Act 1979 (c 33), s 28(1). A lien fits within the definition of (j) : a right or interest of any person, being a right which has been made real, otherwise by the recording of a deed in the Register of Sasines or by registration.

16. As stated, this is also Professor McBryde's view, but for quite different reasons : *Contract*, pp 315-316.

17. See M Planiol, *Civil Law Treatise*, vol 2, (1959), s 2521 for France. See T J Scott, *LAWSA*, vol 15, para 119 for South Africa.

6. THE PRE-REQUISITES OF LIEN

176. General. Being a right in security a lien requires for its foundation a debt or obligation *ad factum praestandum*, the performance of which it secures.¹ The categories of obligation which may be secured by a lien have already been discussed.² The second requirement for the constitution is that the creditor in the obligation holds the property over which the lien is being claimed, in order that he may with-hold it from the debtor and thereby enforce his security. This pre-requisite is examined in detail below.³

An interesting matter which has never been the subject of previous examination in Scotland is the question of when the right in security actually comes into existence. The answer here must be that the real right arises when both pre-requisites are present. With special lien, the property normally will have come into the creditor's

hands before the debt becomes exigible. For example, goods are sent to be repaired. Only on the repairer carrying out the work does the repair bill become chargeable. Only at this point does the lien arise. In general lien, the debt will often pre-date the delivery of the property. For example, a document sent to a solicitor in September may validly be held to secure conveyancing charges incurred in August.

The question of when a lien comes into existence is particularly important in the case of an insolvency. It is settled beyond doubt that a lien will not be effectual unless the property came into the creditor's hands prior to the debtor being sequestrated, or in the case of a company, liquidated.⁴ Provided that the property was delivered in the ordinary course of business a lien is unlikely to be struck down as an unfair preference.⁵ It is difficult to find authority as regards the situation where the property came into the lien-holder's hands before the debtor was sequestrated but the debt only arose after the sequestration. Applying general principles, there can be no valid lien here, because the law does not permit the creation of real securities after a sequestration.⁶

1. *Gloag and Irvine*, p 341; A J Sim, *SME*, vol 20, para 66.

2. See above, paras 165-171.

3. See below, paras 177-184.

4. Bell, *Commentaries*, II,89; *Gloag and Irvine*, pp 344-346; H Goudy, *Bankruptcy*, (4th ed, 1914), p 543; W M Gloag, *Encyclopaedia*, vol 9, para 470; D M Walker, *Civil Remedies*, (1974), p 67; A J Sim, *SME*, vol 20, para 69; *Jackson v Fenwick's Tr* (1899) 6 SLT 319. The same principle applies to retention of money : *Meldrum's Trs v Clark* (1826) 5 S 122; *Dickson v Nicholson* (1855) 17 D 1011; *Stevenson, Lauder & Gilchrist v Macbrayne* (1896) 23 R 496 and *Scottish Union and National Insurance Co v Fairley* (1900) 8 SLT 154.

5. *Anderson's Tr v Fleming* (1871) 9 M 718. See also *Crockhart's Tr v Hay & Co Ltd* 1913 SC 509.

6. See, for example, *Gloag and Irvine*, pp 4 and 8-9.

177. The need for possession. It is a truth universally acknowledged that a man who is not in possession of a piece of property will be in want of a lien upon it.¹ Thus the very first thing which Bell says about retention in his *Principles* is : "This right results from possession."² In the view of Goudy, "Lien is the child of possession."³ Similarly Sim writes that :

"[A] lien demands possession of the security subjects by the person asserting the lien."⁴

Statements such as these resound down the last two centuries.⁵ They are usually followed by other statements making it clear that it is possession which is required and that mere custody will not suffice.⁶ A whole train of cases is regularly cited to prove this point. For the Scottish courts have held that following parties do not have a lien : a clerk or servant with regard to his employer's horses;⁷ persons employed to cut wood under the supervision of the estate manager with regard to that wood;⁸ a branch manager with regard to a liquor licence;⁹ and a company secretary with regard to the books of the company.¹⁰

1. With apologies to Jane Austen and the first line of *Pride and Prejudice*.

2. Bell, *Principles*, s 1410.

3. H Goudy, *Bankruptcy*, (4th ed, 1914), p 543. Lien is similarly described in the pleadings in *Malcolm v Bannatyne* 15 Nov 1813, FC.

4. A J Sim, *SME*, vol 20, para 68.

5. See Bell, *Commentaries*, II,87; Hume, *Lectures*, III,57; *Gloag and Irvine*, p 341; W M Gloag, *Encyclopaedia*, vol 9, para 464; D M Walker, *Civil Remedies*, (1974), p 66; W A Wilson, *Debt*, (2nd ed, 1991), para 7.7; *Levitt v Cleasby* (1823) 2 S 184 per the Lord Ordinary.

6. For example, *Gloag and Irvine*, pp 342-343; D M Walker, *Civil Remedies*, (1974), p 66; D J Cusine and A D M Forte, *Scottish Cases and Materials in Commercial Law*, (1987), p 159; A J Sim, *SME*, vol 20, para 70.

7. *Burns v Bruce & Baxter* (1799) Hume 29.

8. *Callum v Ferrier* (1822) 2 S 102; affd (1825) 1 W & S 399.

9. *Clift v Portobello Pier Co* (1877) 4 R 462.

10. *Gladstone v McCallum* (1896) 23 R 783; *Barnton Hotel Co Ltd v Cook* (1899) 1 F 1190. See also the comparative authority of *Dickson v Nicholson* (1855) 17 D 1011 where it was held that a commercial traveller could not retain money in security of his salary being paid.

178. The difference between custody and possession. To work on the basis that possession will found a lien whereas custody will not, requires that the difference between the two be known. With custody, the property in question is held exclusively for another. A custodier has no *animus* to hold the property for his own

use.¹ Conversely, a possessor has such an *animus*. He holds for his own rights and interests.² The distinction has often been blurred. Here is Lord Ivory from 1856 :

"[T]here have, in our own law, arisen sometimes considerable difficulties as to the distinction between custody and possession. Questions may arise as to goods, which, in a certain sense, are in custody, if in the hands of a workman who gets them for the special purpose of performing operations upon them, - which being performed, the article has been changed in shape, and is, in its changed state, restored to the owner. The workman has the custody, but the possession is still in the proprietor. Again, a carrier has a limited custody, but not possession. A manufacturer has, perhaps, a higher right, but still he has not possession. He is merely the hand which holds the goods for a certain purpose, and his custody is the possession of the proprietor."³

As Professor Reid writes, this is a useful passage.⁴ It gives us the information that workmen, carriers and manufacturers only have custody. However, the absorption of this information leads to the recognition of a major problem. Those who have done work upon goods, those who have carried goods and those who have manufactured goods may only have custody of those goods. Nevertheless the law is clearly settled that these individuals are entitled to a lien.⁵ Further, it is not very difficult to think of another clear example of a lien based on mere custody. That is the lien of the warehouseman or storekeeper, which Gloag and Irvine openly accept to be founded on mere custody and not possession.⁶ Indeed there have been other times when the judiciary have referred to lien being based on custody rather than possession.⁷

1. *Stair*, II.1.17; K G C Reid, *SME*, vol 18, para 125; D M Walker, *Civil Remedies*, (1974), p 66; W M Gordon, *Scottish Land Law*, (1989), paras 14.03-14.06; D L Carey Miller, *Corporal Moveables in Scots Law*, (1991), paras 1.13-1.14.

2. *Ibid.*

3. *Hamilton v Western Bank* (1856) 19 D 152, at 161.

4. *SME*, vol 18, para 125, n 7.

5. Bell, *Commentaries*, II.94-97; II.100; and II.104; *Gloag and Irvine*, pp 349-352 and 400-403; *Harper's Creditors v Faulds* (1791) Bell's Octavo Cases 440; *Stevenson v Likly* (1824) 3 S 291; *Peebles & Son v Caledonian Railway Co* (1875) 2 R 346.

6. *Reid v Watson* (1836) 14 S 223; *Laurie & Co v Denny's Tr* (1853) 15 D 404; *Gloag and Irvine*, p 342. See also A J Sim, *SME*, vol 20, para 70.

7. For example, *York Buildings Co v Robertson* (1805) Mor App Hypothec No 2 (lien of Governor of a company based on custody of papers).

179. Lien based upon custody. The thesis to be advanced tentatively here is that a lien need only be based on custody rather than possession.¹ One exception must be immediately admitted and that is the lien of the *bona fide* possessor for improvements.² It goes without saying that this right depends on possession because a person cannot be a *bona fide* possessor unless he believes the property in question is his and therefore has the *animus* to possess. As regards the other cases of lien, it has already been seen that those who perform operations to a subject, manufacturers, carriers and storekeepers all have mere custody.³ They do not have an *animus* to hold the property in their own interest as they carry out their jobs. They merely hold property for its owner while they carry out some function with respect to it.

The same logic may be applied to other traditional instances of lien. Solicitors do not hold title deeds for their own benefit. They hold them because they are acting for their clients.⁴ Factors do not hold their principals' property for their own use. They hold it because their principals have given them a job to do in respect of that property. A banker no more possesses negotiable instruments deposited with him by his customer than a storekeeper possesses goods deposited with him by his.⁵ It seems quite clear therefore that the majority of liens are based on custody and not possession. If exceptions to this rule are sought, then in addition to the lien of the *bona fide* possessor, one might point to the lien of the unpaid seller for according to statute it rests on possession.⁶ However, it in many ways is no ordinary lien.⁷

1. It is not the first time that a writer has recognised that a lien may be founded upon custody. Most previous accounts, however, are very confusing. For example, J J Gow, *The Mercantile and Industrial Law of Scotland*, writes at p 292 that lien "is the right of the custodier of the property of another to retain it . . ." But at p 293 he writes that lien "arises from and continues with possession." See also *Gloag and Irvine*, pp 342-343 and A J Sim, *SME*, vol 20, para 70.

2. See above, para 170.

3. See the preceding paragraph.

4. Thus in the early case of *Mitchel v McAdam* (1712) Mor 11096, reference was made to papers subject to a law agent's lien being in his "custody". See further, *Stevenson v Robertson-Durham* (1904) 20 Sh Ct Rep 319, at 322 per Sheriff Maconochie.

5. On the tricky issue of liens upon negotiable instruments, see above, para 174.

6. Sale of Goods Act 1979 (c 54), ss 39 and 41-43. In fact the lien can be asserted when the seller is acting as "custodian" for the buyer : s 41(2).

7. See *A P Bell*, p 137. For example, the lien-holder unlike most others has an automatic right of sale : 1979 Act s 39(1)(c).

180. Lien based upon custody : criticism. The proposition that lien may rest on custody is not late twentieth century iconoclasm. Authority for it may be found in the judgement of Sir Ilay Campbell, the Lord President in the important 1791 decision of *Harper's Creditors v Faulds*.¹ Speaking in the context of the lien of a person who has performed work upon a subject he says :

"But the goods are delivered for a precise and special purpose, and for no other; there is no idea of transferring the property, nor of giving it in pledge, nor of transferring even the possession in a legal sense : the artificer has the mere naked custody of the goods; the civil possession is with the owner : the actual possession or custody may be with him too."²

Therefore, just to stress the point, the lien here rests not on possession but on mere naked custody. The workman could not have a barer title. Professor More criticises the Lord President's reasoning.³ He sees retention as the equivalent of arrestment. In other words if another creditor can arrest the property in the hands of the holder, then the holder too has right : he may retain the property for what he is owed. More argues that if the holder has only custody and not possession then the property cannot be arrested in his hands and that consequently no right of retention is competent either.

This argument, however, does not find support in the law of arrestment. The fact of the matter is that where property is in the hands of a person other than the owner in terms of a contract involving mutual obligations, possession is regarded as not being with the owner so an arrestment is competent.⁴ Bell gives the examples of carriers, shipmasters, factors and depositaries.⁵ On the other hand where property is held by

persons with no right to prevent the owner demanding his goods, for example, servants, clerks or stewards, arrestment is incompetent.⁶

A more convincing argument is that while liens regularly arise in situations where the creditor has mere custody, the actual creation of the real right transmutes the creditor's holding from custody into possession. For example, a carrier transports goods. While transporting them he has custody. When he has completed his job, he has a lien in respect of his charges. The existence of such a lien means that the carrier is holding the property for his own use, that is until he is paid. He therefore arguably has the necessary *animus* for possession.

The present writer is reluctant to come to a definite conclusion here. Certainly such an argument conflicts with the high authority of Lord President Campbell. On the other hand, civilian and mixed systems elsewhere accept that lien-holders have possession.⁷ The problem is that the Scots law of possession is badly in need of research and analysis. All that may be concluded here is that the traditional thesis stating that possession will found a lien and custody will not is of doubtful validity.

1. (1791) Bell's Octavo Cases 440.

2. At p 472. Note also *Bogle v Dunmore & Co* (1787) Mor 14216, where the court accepted that a shipowner as carrier was regarded as not having possession of the goods. See *Gloag and Irvine*, p 283.

3. More, *Notes to Stair's Institutions*, cxxxi, at cxxv.

4. Bell, *Commentaries*, (2nd ed), p 470; (7th ed), II,70.

5. *Ibid*; *Appin's Creditors* (1760) Mor 749; *Matthew v Fawns* (1842) 4 D 1242; *Kellas v Brown* (1856) 18 D 1089.

6. Bell, *Commentaries*, II,70, citing *Cunningham v Home* (1760) Mor 747.

7. For Germany, see F Baur, *Lehrbuch des Sachenrechts*, (13th ed, 1985), p 540. For Quebec, see J B Claxton, *Security on Property and the Rights of Secured Creditors under the Civil Code of Quebec*, (1994), para 7.2.3. For South Africa, see T J Scott, *LAWSA*, vol 15, paras 100-102.

181. Custody and servants. In the last paragraph it was seen that the law of arrestment makes a distinction between property being held by parties other than the owner in general and property being held by the owner's servants. However, this

dichotomy is not restricted to arrestment. It is found in the law of lien too. For it appears to be the case that the traditional statement that possession will found a lien whereas custody will not, should be replaced with the statement that mere custody will not found a lien in the case of servants. This proposition is borne out by looking at the cases referred to above, which have traditionally been used to say that there can be no lien based only on custody.

In the 1799 case of *Burns v Bruce and Baxter*,¹ Mr Burns was employed by Messrs Marshall and Company of Berwick as a clerk at Edinburgh in charge of the company's horses. When the company discontinued trading, he sought to retain the animals until his wages and disbursements were met. At the same time other creditors of the company arrested the horses in his hands. In terms of a multiplepounding :

"The Court were of opinion, that Burns had possession of the horses in the capacity of clerk or servant to Messrs Marshall and Co, and that arrestment for their debt was herefore not competent in his hands, - as also, that, for the like reason, Burns had no right of retention of the horses for any debt due by the company to himself."²

In *Callum v Ferrier* a person employed to cut wood was under the superintendence of the manager of the employer.³ The employee was held to have no right of retention. In *Clift v Portobello Pier Co* a manager on a written contract of service who was summarily dismissed was decreed to return a liquor licence forthwith.⁴ Finally, in the cases of *Gladstone v McCallum*⁵ and *Barnton Hotel Co Ltd v Cook*⁶ it was held that a company secretary has no lien over the books of the company. In both of these the judges pointed out that the secretary was the employee or servant of the company.⁷ However, they went on to say that this fact meant that he did not have the possession necessary to constitute a lien.⁸ The matter is better analysed simply in terms of as he was a servant the secretary had no lien.⁹

1. (1799) Hume 29.

2. At 30.

3. (1822) 2 S 102; affd (1825) 1 W & S 399.

4. (1877) 4 R 462.

5. (1896) 23 R 783.

6. (1899) 1 F 1190.

7. *Gladstone v McCallum* (1896) 23 R 783, at 784 per Lord President Robertson; *Barnton Hotel Co Ltd v Cook* (1899) 1 F 1190, at 1193 per Lords Kinnear and McLaren.

8. *Ibid.* Lord McLaren in *Gladstone*, at 785 makes a comparison with a solicitor "who is lawfully in possession of his client's papers under a contract of agency."

9. Note here also the case of *Dickson v Nicholson* (1855) 17 D 1011 where a travelling salesman was not allowed to retain money in security of his salary. Lord Ivory at 1014 referred to him as a "mere traveller".

182. English influence. It can be seen that there is some coherence between the cases to the effect that servants are not entitled to a lien under Scots law. The question of how this rule originated is an interesting one. Professor McBryde, for one, does not see it as a good rule, being of the view that contracts of employment should be treated no differently from other contracts and that servants should be entitled to liens.¹ It would appear to be the case that in fact there is English influence here.

In English law there exists a concept called bailment which refers to the owner of movable property placing it in the possession of another party.² That other party is referred to as a "bailee". The long established position is that an employee or servant cannot be a bailee.³ Here is Palmer, the leading authority on bailment :

"It has been stated on innumerable occasions that a servant who, as a concomitant of his employment, acquires custody of his master's goods does not in ordinary circumstances become a bailee. Possession is deemed to remain in the master in such circumstances".⁴

Most bailees in English law have liens, for example, carriers, repairers and storekeepers.⁵ Servants, on the other hand, have no such rights. This is all very resonant of the opinions expressed in the *Gladstone* and *Barnton Hotel* cases referred to above that an employee does not have the possession to found a lien.⁶

The mix up in the Scottish law of lien between custody and possession would appear to have its foundations in Bell paying too much heed to English authority. He seems to have overlooked the fact that the element of intention in possession is different north and south of the border. In England the requisite *animus* is an intention to exclude others.⁷ In Scotland it is an intention to hold for one's own use.⁸ A lien-holder does have an intention to exclude others, for example thieves. However, whether he intends to hold for his own use is far more questionable, a matter which has been discussed above.⁹ One only has to look at Bell's section on possession in the context of lien in his *Commentaries* to see that it is almost wholly based on English law.¹⁰

Accepting that there has been considerable English influence here enables conclusions to be drawn. In the first place, the fact that an individual only has custody of property does not prevent a lien from arising.¹¹ This is a minimum requirement, hence holders with the additional *animus* necessary for possession may also have a lien. In the second place, employees or servants cannot have a lien simply because they only hold as employees or servants and therefore cannot detain their masters' goods.

1. W W McBryde, *Contract*, (1987), pp 313-314.

2. See Sir William Jones, *An Essay on the Law of Bailments*, (1781); G W Paton, *Bailment in the Common Law*, (1952); *Halsbury*, vol 2, para 1801-1892; A P Bell, chapter 5; N E Palmer, *Bailment*, (2nd ed, 1991).

3. G W Paton, *Bailment in the Common Law*, (1952), p 4, adopting the definition of bailment in Sir Frederick Pollock and R S Wright, *Possession*, (1888), p 163.

4. N E Palmer, *Bailment*, (2nd ed, 1991), p 456.

5. Paton, pp 184-195 and pp 273-277; *Halsbury*, vol 28, paras 534-541; I Davies, *Textbook on Commercial Law*, (1992), pp 321-323.

6. See the preceding paragraph.

7. Paton, above, p 9.

8. *Stair*, II.1.17; K G C Reid, *SME*, vol 18, para 125.

9. See above, para 180.

10. Bell, *Commentaries*, II,87-91. Most of the cases he relies upon are English, for example, *Heywood v Waring* (1815) 4 Camp 291; *Kinloch v Craig* (1789) 3 TR 119; 100 ER 487 and *Kruger v Wilcox* (1755) Amb 252; 77 ER 168.

11. As much seems to have been accepted by Gloag in the *Encyclopaedia*, vol 9, para 464. Under the title "Lien is dependent on possession", he writes "Possession, in this particular, involves both physical custody and a right to possess." He does not substantiate what he means by "right to possess".

183. Types of holding which may found lien. Bell was of the opinion that only actual possession of the property in question was capable of establishing a lien upon it. He wrote :

"It is not sufficient that goods or money have been sent, with orders to be delivered to the person claiming the lien, if they have not actually come into his custody."¹

As we have seen, mere custody rather than actual possession may well be enough.² The question of whether the property is being held in a manner effective to create a lien is one of fact.³ Thus in one case,⁴ shipbuilders contracted with a firm of engineers to place engines in a ship. The vessel was towed to the public harbour of Leith for the engines to be fitted. This work was duly carried out. At all times one of the shipbuilders' men remained aboard the ship and, further, the contract provided that the vessel was "throughout in charge of the shipbuilders". It was held that these facts meant that the engineers never obtained possession of the ship and therefore could not assert a lien over it.⁵

The courts have been of the opinion that, contrary to Bell, civil possession too may form the basis of a lien. Thus in *Gairdner v Milne & Co*⁶ a factor was held entitled to retain an insurance policy belonging to his principal when in fact the policy was held for the factor by a policy broker and had never been in the factor's custody.⁷ There appears to be no cases which sanction the possibility of a lien by symbolical possession.⁸

1. Bell, *Commentaries*, II,87. He cites *Kinloch v Craig* (1789) 3 TR 119; 100 ER 487 and *Young v Stein's Tr* (1789) Mor 14218 in support of his proposition. Both cases involve bills of lading.

2. See the preceding paragraph.

3. *Gloag and Irvine*, pp 341-342; W A Wilson, *Debt*, (2nd ed, 1991), para 7.7; *Barr & Shearer v Cooper* (1875) 2 R (HL) 14; *Paton's Trs v Finlayson* 1923 SC 872.

4. *Ross & Duncan v Baxter & Co* (1885) 13 R 185.

5. It is submitted that for the same reasons that they did not obtain custody either.

6. (1858) 20 D 565.

7. See also *Wilmot v Wilson* (1841) 3 D 815. Cf *Levitt v Cleasby* (1823) 2 S 184. Further, see *Renny v Rutherford* (1840) 2 D 676; *Renny v Kemp* (1841) 3 D 1134, discussed, below, para 72.

8. Indeed, the cases cited in note 1 point to the opposite.

184. Custody must have been legitimately obtained. A lien must be founded upon custody which is legitimate.¹ Custody acquired by fraud or by a void contract will not do.² Similarly where the custody has been obtained by mistake a lien cannot be established.³

More specific examples of illegitimate custody have also been recognised. Thus a law agent was not allowed to plead a lien in regard to the rental book of an estate against a judicial factor where the latter was considered to be the natural custodian of the property.⁴ In another case a horse had been sold and was delivered to the buyer.⁵ He thereupon rejected the animal and tried to return it to the seller, who refused to take it. When he eventually changed his mind, the buyer pled a right of retention in respect of his expenses in caring for the horse. The court held that upon rejecting the animal the buyer no longer had legitimate possession of it and therefore had no lien. It was noted that his proper course should have been to deliver the horse into neutral custody upon rejecting it.⁶

In one old case where a creditor had obtained possession of some of his debtor's property by way of an irregular pouding it was held that despite the irregularity he had a right to retain the goods until paid.⁷ This decision is universally accepted as being wrong.⁸ Lord Justice-Clerk Braxfield commented on the Lord President who gave the leading opinion in that case, in the following terms :

"Arniston, though a great man, was wrong : *aliquando bonus dormitat Homerus*"⁹

1. Bell, *Commentaries*, II.88-89; Bell, *Principles*, s 1413; Hume, *Lectures*, vol III, p 58; *Gloag and Irvine*, pp 343-344; A J Sim, *SME*, vol 20, para 69; *Shepherd's Trs v MacDonald, Fraser & Co* (1898) 5 SLT 296 per Lord Stormonth Darling; *Barclay v Guthrie* (1887) 3 Sh Ct Rep 103 per Sheriff Hall.

2. Bell, *Principles*, s 1413; Hume, *Lectures*, III.58.

3. Bell, *Principles*, s 1413; *Louison v Craik* (1842) 4 D 1452. A similar rule applies in England : *Lucas v Dorrien* (1817) 7 Taunt 278; 129 ER 112. Hume's statement that possession obtained in "an accidental way may be sufficient" (*Lectures*, III.58) must be regarded as wrong. See the comments of G C H Paton, the editor of Hume's *Lectures*, at III.58, note 172.

4. *Mackay* (1867) 3 SLR 329.

5. *Barclay v Guthrie* (1887) 3 Sh Ct Rep 103.

6. See *McBey v Gardiner* (1858) 20 D 1151.

7. *Glendinning's Creditors v Montgomery* (1745) Mor 2573.

8. Bell, *Commentaries*, II.89; Bell, *Principles*, above; Hume, *Lectures*, above; *Gloag and Irvine*, p 343; *Hastie & Jamieson v Arthur* (1764) per Lord Pitfour (see Bell, *Commentaries*, II.89); *Harper's Creditors v Faulds* (1791) Bell's Octavo Cases 440; *Patten v Royal Bank* (1853) 15 D 617; *Laurie v Denny's Tr* (1853) 15 D 404, at 409 per Lord Ivory.

9. *Harper's Creditors v Faulds* (1791) Bell's Octavo Case 440, at 471.

185. Loss of custody. The general rule is that if the lien-holder loses custody of the property then this will extinguish his lien upon it.¹ Thus Bell writes :

"A person possessed of property, and entitled to a lien, loses it the moment he quits his possession."²

Thus where tyres were sold by a dealer to a buyer it was held that the lien of the dealer was lost upon delivery of the goods.³ Likewise a factor loses his lien upon property when he delivers it to his principal.⁴ Where, however, a number of items are subject to a lien and custody is lost of some of them, the rest remain burdened by the lien to the extent of the whole debt due.⁵ Thus where goods had been carried by sea and some had been delivered on arrival in port, the lien of the shipowner for carriage remained over the rest.⁶ Similarly, where a law agent abandoned his lien over the titles of a portion of his client's property his right of retention over the titles of the remainder of the property for the whole balance was not affected.⁷

Bell writes that a lien will not be lost if the property is "taken 'away' by undue means."⁸ This would seem to be a fair statement, cohering with the Roman law which allowed a party with a *ius retentionis* to sue for theft.⁹ It also finds support in the Sale of Goods Act 1979, which provides that the unpaid seller loses his lien where "the buyer or his agent *lawfully* obtains possession of the goods" (my emphasis).¹⁰ Under the Civil Code of Quebec an individual with a lien does not lose it if he is involuntarily dispossessed and has the right to have the property returned to him.¹¹ By way of contrast, under South African law the lien is lost even although the dispossession is involuntary.¹² However, the erstwhile lien-holder has the *mandament van spolie* in order to get the thing back and re-acquire his lien. In Scotland the counterpart to this remedy, *spuilzie*, would arguably be similarly available.¹³

Bell is also of the view that the lien will subsist if the property is released in error.¹⁴ More controversial is his statement that a lien "may be reserved by agreement" between debtor and creditor.¹⁵ This creates the possibility of liens which are *de facto* hypothecs and which violate the principle of no security without publicity.

In fact this position seems already to have been reached, for in some eighteenth century cases it has been held that a solicitor retains his lien over title deeds which he has lent to another solicitor employed by his client.¹⁶ The reasoning of Lord Gillies of why this is the case is as follows :

"In my opinion [the lien] remained as secure as ever. He parted with the actual custody of the titles, but not with their legal custody. Legally and civilly speaking, he remained custodian through the medium of [the second solicitor] holding them from him on loan."¹⁷

This is somewhat perplexing. Whilst it is well known that there are different sorts of possession such as actual, civil and symbolical, it is generally thought that custody denotes physical holding only.¹⁸ Thus the opinion of Lord Gillies does not seem convincing. Even the fact which he highlights,¹⁹ that the second solicitor had to return the deeds on demand, does not remove the basic truth that by parting with them he lost the custody thereof.

Similar logic to that of Lord Gillies was applied in the 1953 case of *John Penman Ltd v Macdonald*.²⁰ There a gentleman who was not a professional accountant was employed by a firm to write up their business books. He had given up custody of the books for a time to the firm's auditor, but had later recovered it and then sought to retain the items until he was paid. The firm argued that the lien was confined to the value of the services performed after the date he recovered the books. The Sheriff-Substitute disagreed. He held that giving the books to the auditor was not "a relinquishing of possession".²¹ Further :

"The defender's contract of employment was still running and he remained in constructive possession. In any event the handing of the books to the auditor . . . was not a restoration of these articles to the pursuers."²²

The fact is that the matter of to whom the property is relinquished is irrelevant.²³ Moreover, a lien by constructive possession amounts to no less than a secret lien and has little to commend it.

1. Bell, *Principles*, s 1415; Hume, *Lectures*, III,58; *Gloag and Irvine*, p 360; D M Walker, *Civil Remedies*, (1974), p 72; A J Sim, *SME*, vol 20, para 74; *Petrie v Geddes* (1823) 2 S 485; *Morrison v Fulwell's Tr* (1901) 9 SLT 34.

2. Bell, *Commentaries*, II,89.

3. *London Scottish Transport Ltd v Tyres (Scotland) Ltd* 1957 SLT (Sh Ct) 48.

4. *Kruger v Wilcox* (1755) Amb 252; 27 ER 168. Although an English case, the same would hold in Scotland : see Bell, *Principles*, II,89-90.

5. *Gloag and Irvine*, pp 360-361; A J Sim, *SME*, vol 20, para 74. See too the American Law Institute, *Restatement of the Law of Security*, (1941), s 80(2).

6. *Malcolm v Bannatyne* 15 Nov 1814, FC.

7. *Gray v Wardrop's Trs* (1851) 13 D 963; revd (1855) 18 D (HL) 52.

8. Bell, *Principles*, s 1415. "Away" is Sheriff Guthrie's addition.

9. See above, para 129.

10. Sale of Goods Act 1979 (c 54), s 43(1)(b).

11. Civil Code of Quebec, art 1593.

12. T J Scott, *LAWSA*, vol 15, para 102.

13. See K G C Reid, *SME*, vol 18, paras 161-166. The problem here is that a lien-holder arguably may only have custody. See above, paras 179-180.

14. Bell, *Principles*, s 1415.

15. *Ibid*.

16. *Campbell v Montgomerie* (1839) 1 D 1147; *Renny v Rutherford* (1840) 2 D 676; *Renny v Kemp* (1841) 3 D 1134. See also *Ure & Macrae v Davies* (1917) 33 Sh Ct Rep 109.

17. *Renny v Rutherford* (1840) 2 D 676, at 683.

18. See K G C Reid, *SME*, vol 18, para 125.

19. *Op cit* n 17.

20. 1953 SLT (Sh Ct) 81.

21. At 82.

22. *Ibid*.

23. See Bell, *Principles*, s 1415. All that matters is that the erstwhile lien-holder parts with the property.

186. English authority. It is worth noting that most commentators on English law accept that a lien will continue if the property in question is delivered to the owner or another party merely for a limited purpose with the intention that the lien will subsist.¹ However, there is really only one case to support this point. There, a repairer's lien over a taxi was held not to be extinguished by the owner temporarily removing the vehicle in order to ply for hire.² Nevertheless, the general rule is clear that where a lien-holder parts with the property he will normally forfeit his lien.³

1. See G W Paton, *Bailment in the Common Law*, (1952), pp 184-185; *Halsbury*, vol 28, para 523; *A P Bell*, p 145.

2. *Abermarle Supply Co Ltd v Hind & Co Ltd* [1928] 1 KB 307.

3. See the works cited in note 1 and *Forth v Simpson* (1849) 13 QB 680; 116 ER 1423; *Jackson v Cummins* (1839) 5 M & W 342; 151 ER 145 and *Scarfe v Morgan* (1838) 4 M & W 270 at 283; 150 ER 1430.

187. Effect of recovery of custody. Bell wrote that, with the exception of the liens of a factor and a policy broker, where a lien had been lost by the property being parted with, it did not revive on possession being recovered.¹ Factors and policy

brokers both have general liens² and it is submitted that in fact the same rule applies to all holders of general liens.³ As a general lien is good for all sums owed in a course of trading or employment, obtaining custody of the property once more will create a lien which secures the same debts that were secured prior to relinquishing the custody. If one wishes to be very precise, then what actually happens is that the old general lien is replaced by a new general lien. In practice this is of course exactly the same as the original lien reviving.

As regards special liens, Bell's rule means that once the property is parted with "the lien seems to be extinct beyond revival".⁴ The case of *London Scottish Transport Ltd v Tyres (Scotland) Ltd*⁵ illustrates this principle. There, some goods were delivered under a contract of sale. The sellers subsequently suspected that the buyer was nearing insolvency and instructed an agent to uplift most of the goods. This he was able to do. The buyer duly went into liquidation and the seller claimed a lien over the goods under the Sale of Goods Act. It was held that the seller had no such right, his lien having been lost on the goods being delivered. The recovery of the goods did not revive the lien. In a subsequent case it was held that an unpaid seller's lien may revive if the buyer returns the goods to the unpaid seller with the intention that the lien should be revived.⁶ It may be doubted whether this situation will be encountered very often.

1. See Bell, *Commentaries*, II,90; *Principles*, s 1449 and *Gloag and Irvine*, p 360.

2. See, for example, Bell, *Commentaries*, II,109-112 and 115-117.

3. On this matter, see *Gloag and Irvine*, p 360.

4. Bell, *Commentaries*, II,91.

5. 1957 SLT (Sh Ct) 48.

6. *Hostess Mobile Catering v Archibald Scott Ltd* 1981 SC 185. This view had also been expressed by the Sheriff in *London Scottish Transport Ltd*, at 49. See too D L Carey Miller, *Corporeal Moveables in Scots Law*, (1991), para 11.21d.

7. OWNERSHIP OF THE PROPERTY

188. General. The basic rule is that a contractual lien may only be exercised over a piece of property where the obligation the lien secures is owed by the owner of the property to the lien-holder.¹ In other words A's property cannot be detained for an obligation owed by B without A's authorisation. Thus in one case the burgh of Auchtermuchty had become insolvent and some of the councillors employed a solicitor to act for them.² He claimed a lien over the title deeds of the burgh for his account. It was held that he had no such right, for he had not been employed by the Magistrates and Council of Auchtermuchty as a whole. In another case a bank was held not entitled to retain a bill of exchange deposited by someone, in security of his debts, where it was found that that person did not own the bill.³

The rule as regards enrichment and delictual liens is less certain, because of the nascent state of the law. Clearly the *bona fide* possessor's lien is enforceable against the true owner of the property.⁴ Thus the rule which applies to contractual liens would seem to apply to enrichment liens. With respect to delictual liens, a case could arise where A takes B's car and drives it into C's wall. Can C detain the car from B in respect of the damage caused by A ? There is sadly no ready answer here.

1. *Gloag and Irvine*, p 349; W M Gloag, *Encyclopaedia*, vol 9, para 474; D M Walker, *Civil Remedies*, (1974), pp 65-66; A J Sim, *SME*, vol 20, para 72. The exception to the rule is the innkeeper's lien which will attach to any goods brought into the inn, no matter who owns them : *Bermans and Nathans Ltd v Weibye* 1983 SC 67. The reasons for this are discussed elsewhere. See below, para 229.

The brief report of the case of *Lesly v Hunter* (1752) Mor 2660 suggests that a bleacher may retain cloth he has bleached even although the true owner did not authorise the bleaching. However, the Session Papers disclose that the owner agreed to pay for the cost of the bleaching in that case. The dispute was over the entire balance due from the third party who had sent the cloth for bleaching and the bleacher. The court held rightly that the true owner did not have to pay that balance before he could get his cloth back. I wish to record my thanks to the Keeper of the Advocates Library and Catherine A Smith, the Senior Librarian for permitting me access to the Session Papers.

2. *Walker v Phin* (1831) 9 S 691.

3. *Farrar and Rooth v North British Banking Co* (1850) 12 D 1190.

4. See above, para 170.

189. Authorised persons. A person who has either the express, implied or ostensible authority of the owner to subject his property to a lien may effectually allow a lien to be created over that property.¹ A mercantile agent within the meaning of the Factors Acts is given that right in terms of that set of statutes.²

The question of authorisation was the subject of the recent case of *Republic of the Sudan v Sagax Aviation Ltd.*³ There A contracted with B for the overhaul of 5 helicopter engines, knowing that the work would be sub-contracted to C. C, in fact sub-contracted to a subsidiary, D, who stopped work on the insolvency of B and demanded payment, in the meantime claiming a lien on the engines. A argued that D had no lien, being an unauthorised sub-contractor. D, in reply, argued that B had implied authority to sub-contract the work to any company in C's group and, further, that A had become aware of what was going on and not objected. The court held that there was nothing in the contract which allowed a further sub-contract. However, the case was sent to proof before answer on the issue of whether A had knowledge of the matter and did nothing about it.⁴

1. W M Gloag, *Encyclopaedia*, vol 9, para 472; A J Sim, *SME*, vol 20, para 72.

2. Factors Act 1889 (c 45) applied to Scotland by the Factors (Scotland) Act 1890 (c 40), s 1. See in particular the 1889 Act ss 1(1), 1(5) and 2.

3. 1990 GWD 29-1681.

4. If A's knowledge was proven, then he would arguably be personally barred from denying the lien. See below, para 192.

190. Where the owner has voluntarily allowed another to hold his property. Situations may arise where the owner of property has placed it in the hands of another, for example in terms of a contract of hire or hire purchase. The question arises whether the person who has received possession may allow a lien to be created over the property which will be valid against the owner. It appears that the law here is quite settled. The first Lord President Clyde set it out in the following terms in *Lamonby v Foulds Ltd*:

"[I]n both pledge and lien the principle that the possessor of a moveable can give no better right therein or thereto to a third party than he has himself

acquired from the owner applies, unless the owner has personally barred himself, by some actings of his own, from founding on the limited character of the title he actually gave to the possessor."¹

The facts of the case in which Lord Clyde gave his judgement were as follows. A motor lorry was the subject of a hire purchase agreement, which expressly provided that the hirer was not "to create any lien thereon for repairs". The hirer handed the vehicle to a firm of engineers for repairs. When he subsequently failed to meet his hire purchase payments, the owner sought to recover the lorry from the engineers who pled a lien for their repairs. It was held that no lien was created in respect that the hirer had no title to allow such a creation. The fact that the repairers did not know that the title was so limited was held to be irrelevant.

In a similar case a hirer of a sewing machine under a hire purchase contract was obliged to keep it in her own custody.² In breach of this contract, she stored the machine with a broker. The broker claimed a lien for storage dues when the owner tried to recover his property. It was held that no lien had been validly constituted. In the words of the Sheriff Substitute, the hirer could not "give any title of lien to a storekeeper, because, she had, by the terms of her contract, no title to store."³

Universal commercial practice in contracts of hire following cases such as those described is to have an express clause barring the creation of a lien over the property. For example, the standard form contract of hire for a photocopier which featured in a recent case, contained the following provision:

"8(a) The user agrees not without the written consent of the supplier ... (b) to remove the copier from the installation address or (c) create or permit to be created any lien or encumbrance in respect of the copier."⁴

1. 1928 SC 89. *Republic of the Sudan v Sagax Aviation Ltd* 1990 GWD 29-1681, discussed in the preceding paragraph, is a case where personal bar is arguably relevant.

2. *Glasgow Corporation v Singer Sewing Machine Co* (1918) 34 Sh Ct Rep 177.

3. At 178.

4. *Eurocopy (Scotland) plc v Lothian Health Board* 1995 SCLR 892. See also the hire purchase contract in *Lions Ltd v Gosford Furnishing Co Ltd* 1962 SC 78.

191. Assessing the law. The traditional approach outlined in these cases has been subject to criticism.¹ The truth is that lien, or at least special lien, is a security which usually arises by operation of law.² Given this, the question of whether the person who placed the property in a position whereby it became the subject of a lien had the requisite title to do so may be viewed as irrelevant. This must particularly be the case where the would-be lien-holder has no knowledge of the title possessed, as in *Lamonby v Foulds Ltd*.³

However, as it is the case that the rule *nemo plus juris ad alienum transferre potest, quam ipse haberet* effectively applies to lien, the irresistible conclusion would seem to be that lien to some extent is a consensual security. Such a proposition coheres with the rule explored previously that lien must be founded on a legitimate holding of the property and not one obtained by fraud or mistake.⁴ However, lien cannot be regarded as a consensual security in the same way as pledge, where debtor and creditor require the *animus* to create the real right.⁵ For a special lien will arise by operation of law without any need for *animus*.⁶ The answer to the conundrum probably has more to do with policy than anything else.

The key point is that lien is a species of real right in security. It seems manifestly unjust that simply because it arises by operation of law it should be capable of overruling the rule *nemo plus*. Dire results would follow if this was the case. Thus A could take B's car which he is hiring and contract with C to have it painted pink with yellow spots. B would be unable to recover his car from C until he has paid for work which he would never have authorised in his right mind. To stop this from happening, Scots law has in essence applied the rule *nemo plus* to an involuntary security.

It is valuable to look at other systems here. The law of Quebec is the same as our own in that an effective lien will only arise under a contract where the debtor has the property with the consent of its owner.⁷ German law would appear to take a similar approach.⁸ Dutch law is the same.⁹ However, in the specific case of hire purchase an exception is made in favour of the lien-holder who in good faith believed the hirer to be owner.¹⁰ In English law a workman or bailee claiming a lien may infer the owner's authority from a hirer's use of a piece of property and is not bound by any contractual limitation unless he has knowledge of it.¹¹ In South African law a

contractual lien cannot be enforced against the true owner unless he authorised it.¹² However, where work has been done on a piece of property the workman has an enrichment lien which is good against the world.¹³ This is the law no matter whether or not the owner authorised the work.¹⁴

It may be argued that the South African model should be followed in Scotland so that there would be an enrichment lien, which would secure necessary and useful expenses but not voluptuary ones as in this case.¹⁵ However, the idea that the repairer could have a lien enforceable against the true owner in addition to his contractual claim against the person who had instructed the work is frowned upon by a number of Scottish lawyers.¹⁶

The root of the problem is that if the hirer or other party in possession absconds or becomes insolvent the cost of the work must be met either by the repairer or by the true owner. The current Scottish position is that it falls to the repairer, unless of course the work was authorised by the owner.¹⁷ This seems correct in terms of the fact that the hirer had no title to subject the property to a contractual lien. However, this leaves the question of whether the repairer could have a claim against the owner in unjustified enrichment. This possibility has never been canvassed in the case law and it is felt that this is not the appropriate place to have a substantive discussion of the matter.¹⁸

If however an enrichment claim was felt to be merited here, then the general thrust of this thesis would point to a lien also being admitted. On the other hand, the fact of the repairer having two concurrent claims - that is, against the hirer in contract and against the owner in unjustified enrichment - severely complicates the issue and prevents the easy resolution of the matter.¹⁹

1. For example, Professor Wilson considers *Lamonby v Foulds Ltd* to be wrong : *The Law of Scotland on Debt*, (2nd ed, 1991), para 7.8. See also J J Gow, *Law of Hire Purchase*, (2nd ed), p 164.

2. See below, para 204.

3. 1928 SC 89. Discussed in the preceding paragraph.

4. See above, para 184.

5. See above, para 83.
6. See below, para 204
7. Civil Code of Quebec, art 1592.
8. Good faith on the part of the lien-holder is to no avail : F Lent, *Sachenrecht : Ein Studienbuch*, (14th ed, by K H Schwab, 1974), p 264; F Baur, *Lehrbuch des Sachenrechts*, (13th ed, 1985), p 541.
9. J G Sauveplanne, "Security over Corporeal Movables according to Dutch Law", in J G Sauveplanne (ed), *Security over Corporeal Movables*, (1974), p 163, at p 170.
10. *Ibid*, at p 179, n 5.
11. *Halsbury*, vol 28, para 538; *Green v All Motors Ltd* [1917] 1 KB 625.
12. *Wille's Law of Mortgage and Pledge in South Africa*, (3rd ed, ed T J Scott and S Scott, 1987), pp 92-93; A J Van der Walt and G J Pienaar, *Introduction to the Law of Property*, (1996), pp 370-371; H Silberberg and J Schoeman, *The Law of Property*, (3rd ed, 1992), pp 464-465; T J Scott, *LAWSA*, vol 15, para 99 and paras 117-121.
13. *Wille*, pp 86-92; *Van der Walt and Pienaar*, pp 371-373; *Silberberg and Schoeman*, *ibid*, pp 464-466; T J Scott, *LAWSA*, vol 15, paras 104-114.
14. Unless the property was stolen. See H S Silberberg and J Schoeman, *ibid*, pp 469-471; Van der Walt and Pienaar, *ibid*, pp 375-377; T J Scott, *LAWSA*, vol 15, para 111; *Brooklyn House Furnishers (Pty) Ltd v Knoetze and Sons* 1970 3 SA 264 (A). Further, see S Eiselen and G J Pienaar, *Unjustified Enrichment : A Casebook*, (1993), pp 314-321.
15. See the authorities cited in note 13 above.
16. At a University of Edinburgh Department of Private Law Seminar held on 17 June 1996 and addressed by Professor Sieg Eiselen, consternation was expressed at the idea of Scots law ever adopting the South African position.
17. See the preceding paragraph.
18. Given the fact that it is essentially a matter for the law of unjustified enrichment rather than the law of lien. See, however, W D H Sellar, *SME*, vol 15, para 49.
19. South African writers have appreciated the problems. See *Silberberg and Schoeman*, and *Van der Walt and Pienaar* at the pages given in note 14 above.

192. Personal bar. In certain limited circumstances the true owner will be personally barred from denying that a third party has permitted a lien to be validly created upon his property.¹ For this to happen the true owner must have acted in a manner calculated to mislead the would-be lien-holder and the latter must have been misled by reliance on the owner's actings.² Merely placing one's property in the

hands of another without taking precautions to inform third parties that one is in fact the true owner does not amount to conduct calculated to mislead.³ The rules regarding personal bar are said to be the same for pledge and lien.⁴

1. *Gloag and Irvine*, pp 203-209 and 349; D M Walker, *Civil Remedies*, (1974), pp 65-66; A J Sim, *SME*, vol 20, para 72.

2. See *Gloag and Irvine*, *ibid* and the judgement of Lord Kinnear in *Mitchell v Heys & Sons* (1894) 21 R 600.

3. See above, para 190; *Mitchell v Heys & Sons* (1894) 21 R 600; *Glasgow Corporation v Singer Sewing Machine Co* (1918) 34 Sh Ct Rep 177; *Lamonby v Foulds Ltd* 1928 SC 89.

4. See authorities cited in n 2 and above, para 71.

8. LIEN AS A REAL RIGHT

193. General. As Professor Gretton wrote in his article "The Concept of Security" in 1987, the "most serious difficulty arising from the lack of conceptual foundations in the law of lien is the question of whether a lien-holder has a real right."¹ It is submitted here that there is little doubt that lien is a *jus in re aliena*, in particular for four reasons. Firstly, many authorities until now not brought together state that this is the case. Secondly, lien has always been treated along with pledge and hypothec as a right in security. Thirdly, a lien will prevail over subsequent diligence. Fourthly, a lien holder, because he has a real security, is generally not required to give it up in return for being given some personal security, in other words a cautionary obligation.

1. G L Gretton, "The Concept of Security", in D J Cusine (ed), *A Scots Conveyancing Miscellany*, (1987), p 126, at p 144.

194. The authorities. A considerable number of authorities consider lien to be a real right. The foremost writer on the whole subject of lien, Bell, is chief amongst them. He deals with lien in a section of his *Commentaries* entitled "Of Securities over Moveables in the Nature of Real Right resulting from Possession."¹ Within that section he writes of the various ways in which a lien may be created, for example expressly or by usage of trade and notes :

"In all these cases the real right depends entirely on the fact of possession : it begins with possession, and with the loss of it expires."²

The following writers have also referred to lien expressly as a real right : Carey Miller;³ Gloag and Irvine;⁴ Graham Stewart;⁵ Goudy;⁶ Sim;⁷ Gretton;⁸ and Whitty.⁹ T B Smith may be added to the list, for he treats it under the heading of "Jura In Re Aliena" in his *Short Commentary on the Law of Scotland*.¹⁰

Lien has also been described as a real right from the bench. In the landmark 1791 decision of *Harper's Creditors v Faulds*, the Lord President, Sir Ilay Campbell did just that.¹¹ One of his distinguished successors, Lord President McNeill expressed a similar opinion seventy years later.¹² Likewise at the start of this century, Lord Trayner put the matter in layman's terms when he said that the solicitor's lien was, subject to a certain equitable exception, "good against the world."¹³

Case law generally has treated lien as a real right. Thus where goods were put on a train by a person who failed to pay the carriage, it was held that the railway company could enforce its carrier's lien against the person to whom the goods were sent.¹⁴ Where a solicitor had lien over his client's title deeds in respect of a piece of land, it was held that the lien was good against the client's singular successor.¹⁵ In fact the issue of whether the solicitor's lien is a real right was settled as early as 1749 in the case of *Lidderdale's Creditors v Nasmyth*.¹⁶ In that case some of the judges thought that the right was "no pledge or real right, but only a personal right of retention of the writs".¹⁷ However, the majority held that if the lien "was only good against the employer, it would in most cases be good for nothing",¹⁸ for the law agent's right would be otiose against creditors and singular successors.

It is also possible to point to a statute recognising that lien is a real right. The Sale of Goods Act 1979 (c 54) expressly provides that the unpaid seller's lien "is not affected by any sale or other disposition of the goods which the buyer may have made, unless the seller has assented to it."¹⁹

The authorities in favour of lien being a personal right are not numerous. Professor McBryde writes that :

"[R]etention is not effective against third parties. It is no more than a remedy for A if B is in breach of his contract with A."²⁰

He does not justify the statement. Begg, who wrote a treatise on law agents, refers to the fact that the solicitor's lien is often inaccurately called a hypothec.²¹ He states that the right is "merely a general lien or right of retention, not amounting to a real right either of hypothec or of pledge."²² The statement is ambiguous. However, in the light of the authorities considered in the previous paragraph, it is best read as saying that the law agent's lien is not a real right of pledge or hypothec, but a real right of lien. There are also some stray judicial dicta inferring that lien is a personal right,²³ but as far as can be seen no definitive statements to that effect. It is therefore beyond doubt that the vast majority of authorities consider lien to be real.

1. Bell, *Commentaries*, II,86 *et seq.*

2. Bell, *Commentaries*, II,87.

3. D L Carey Miller, *Corporeal Moveables in Scots Law*, (1991), para 11.15.

4. *Gloag and Irvine*, pp 8 and 359.

5. J Graham Stewart, *Law of Diligence*, (1897), p 165.

6. H Goudy, *Law of Bankruptcy*, (4th ed, 1914), p 543.

7. A J Sim, *SME*, vol 20, para 74.

8. G L Gretton, "The Concept of Security" in D J Cusine (ed), *A Scots Conveyancing Miscellany*, p 126 at p 145.

9. N R Whitty, *SME*, vol 15, para 128.

10. T B Smith, *A Short Commentary on the Law of Scotland*, (1962), p 477.

11. *Harper's Creditors v Faulds* (1791) Bell's Octavo Cases 440, at 472.

12. *Wyper v Harveys* (1861) 23 D 606, at 620.

13. *Drummond v Muirhead and Guthrie Smith* (1900) 2 F 585, at 589. The exception is where the solicitor as well as acting for the owner of the heritable property, is acting for a heritable creditor of the owner. In that case he cannot plead his lien against that creditor : see *Begg*, p 229; *Wilson v Lumsdaine* (1837) 15 S 1211; *Gray v Graham* (1855) 18 D (HL) 52.

14. *Scottish Central Railway Co v Ferguson, Rennie and Co* (1864) 2 M 781. It was held also that no general lien could be exercised here as the requirements set down by the Railway and Canal Traffic Act 1854 (17 and 18 Viet c 31), s 7 had not been met. See also *Morris v Whyte & Mackay*

(1889) 5 Sh Ct Rep 163 (lien of storekeeper valid against purchasers of his customer) and *Tyne Dock Engineering Co Ltd v Royal Bank of Scotland* 1974 SLT 57 (lien of ship repairer valid against mortgagee).

15. *Palmer v Lee* (1880) 7 R 651.

16. (1749) Mor 6248. See above, para 147.

17. At 6249.

18. *Ibid.* In terms of the solicitor's lien is arguably not real, for papers must be handed over to the trustee in sequestration or liquidator. See the Bankruptcy (Scotland) Act 1985 (c 66), s 38(4); the Insolvency (Scotland) Rules 1986, r 4.22(4) and A J Sim, *SME*, vol 20, paras 98 and 100. But as the preference which the solicitor has over the estate is preserved the practical result is no different.

19. Sale of Goods Act 1979 (c 54), s 47(1). See D L Carey Miller, *Corporal Moveables in Scots Law*, (1991), para 11.25.

20. W W McBryde, *Contract*, (1987), p 315.

21. *Begg*, p 205.

22. *Ibid.*

23. See *Laurie v Black* (1831) 10 S 1.

195. Lien treated along with other securities. The writers who do not expressly state lien to be a real right in security nevertheless treat the matter in the context of real rights in security. This invariably means considering lien at the same time as pledge and hypothec. The following writers fall into this category : Bankton;¹ Gloag and Henderson;² Gow;³ Lillie;⁴ Walker;⁵ Cusine and Forte;⁶ Wilson;⁷ and Marshall.⁸

A similar treatment can be found in our statutes. Thus lien is recognised to be a "security" which prevails in a sequestration by the Bankruptcy (Scotland) Act 1985 and its predecessors.⁹ Likewise when Neville Chamberlain was rushing legislation through Parliament to help show Hitler that he had no lien over Poland, the fact that a lien amounts to a real right in security was not forgotten. The Compensation (Defence) Act 1939 enacted :

"Where any sum by way of compensation is paid in accordance with any provisions of this Act requiring compensation to be paid to the owner of any property, then, if at the time when the compensation accrues due, the property

is subject to any mortgage, pledge, lien or other similar obligation, the sum paid shall be deemed to be comprised in that mortgage, pledge, lien or other obligation."¹⁰

As well as being treated along with other securities, lien at times has been assimilated into other securities. This is due to the lack of conceptual foundations in the law of retention and lien. Thus Bankton saw retention as a type of hypothec.¹¹ The solicitor's lien originally was universally called the solicitor's hypothec.¹² Lord Young described lien as "just a contract of pledge collateral to another contract of which it is an incident".¹³ Similarly Gow writes that lien is a "legal pledge".¹⁴ There are innumerable other examples of such statements.¹⁵ Whilst they are open to criticism for not recognising lien as a distinct right, they clearly illustrate that lien is regarded by Scots law as real.

1. *Bankton*, I.17.15-16.

2. W M Gloag and R C Henderson, *Introduction to the Law of Scotland*, (10th ed. 1995), chapter 19.

3. J J Gow, *The Mercantile and Industrial Law of Scotland*, (1964), chapter 4.

4. J Lillie, *The Mercantile Law of Scotland*, (6th ed, 1970), chapter 3.

5. D M Walker, *Principles of Scottish Private Law*, (4th ed), chapter 5.30.

6. D J Cusine and A D M Forte, *Scottish Cases and Materials in Commercial Law*, (1987), pp 122-172.

7. W A Wilson, *The Scottish Law of Debt*, (2nd ed, 1991), chapter 7.

8. E A Marshall, *Scots Mercantile Law*, (2nd ed. 1993), chapter 7.

9. Bankruptcy (Scotland) Act 1985 (c 66), s 73(1); Bankruptcy (Scotland) Act 1856 (19 & 20 Vict c 79), s 4; Bankruptcy (Scotland) Act 1839 (2 & 3 Vict, c 41), s 3. Further, a lien is also good against the trustees under a trust deed for creditors : *Meikle and Wilson v Pollard* (1880) 8 R 69; *Robertson v Ross* (1887) 15 R 67.

10. Compensation (Defence) Act 1939 (2 & 3 Geo VI c 75), s 14. The case of *Liquidator of Callander Hydro Hotel Ltd v Thomson* 1955 SLT 354 discusses the section in relation to heritable security.

11. *Bankton*, I.17.15-16.

12. See Bell, *Commentaries*, II,90; Begg, p 205; *Cuthberts v Ross* (1697) 4 BS 374; *Ayton v Colville* (1705) Mor 6247. Even late in the nineteenth century this terminology was still being used : *Morrison v Watson* (1883) 2 Guth Sh Cas 502.

13. *Miller v Hutcheson & Dixon* (1881) 8 R 489, at 492.

14. J J Gow, *The Mercantile and Industrial Law of Scotland*, (1964), p 292.

15. For example, the Factors Act 1889 (52 & 53 Vict c 45), s 1(5).

196. Lien prevails over subsequent diligence. The fact that a lien will prevail over the later diligence of unsecured creditors also reveals that it is a real right. Bell writes :

"Where the possessor of goods has a hypothec or lien over them, he is not to be deprived of it by poinding . . . So, wherever a factor has lien for his general balance, an artificer for the value of the labour bestowed, a carrier or shipmaster for the carriage and freight, they will be safe from invasion by a poinding creditor."¹

In a similar vein when dealing with the ranking of creditors in a bankruptcy, Bell states that creditors who have "real securities over moveables"² by *inter alia* retention prevail over creditors who have done diligence.

Graham Stewart and Profesor Gretton also recognise that a lien will prevail over creditors subsequently carrying out diligence and indeed both expressly state that lien is a real right.³

1. Bell, *Commentaries*, II,60.

2. Bell, *Commentaries*, II,406.

3. J Graham Stewart, *Law of Diligence*, (1897), p 165; G L Gretton, "The Concept of Security", in D J Cusine (ed), *A Scots Conveyancing Miscellany*, (1987), p 126, at p 145.

197. Lien-holder not bound to give up lien in return for caution. As a person with a lien is considered to have a real security he will not normally have to release his lien on caution being given for the debt which the lien is securing.¹ In a case

involving the right of an agent to retain an insurance policy from his principal, Lord Ordinary (Cuninghame) pronounced :

"[A]ssuming that the agent has a *real lien* on the policy founded on . . . the Lord Ordinary apprehends that it would be contrary to every principle and analogy in the law to compel him to give up that real security on *personal* caution for his ultimate claims."²

Given the fact that a lien is subject to the equitable control of the courts, the replacement of it by caution is not an impossibility.³ However, the general rule is very much as stated, reinforcing the point once more that lien is accepted to be a real right.

1. *Gloag and Irvine*, p 359; A J Sim, *SME*, vol 20, para 74; *McCulloch v Pattison & Co* (1794), unreported, see Bell, *Commentaries*, II,105.

2. *Wilmot v Wilson* (1841) 3 D 815, at 818.

3. *Ferguson and Stuart v Grant* (1856) 18 D 536. See above, para 164.

197. Comparative authority. Other jurisdictions take varying approaches to the question of whether lien is real right. In English law it is said to be a personal right.¹ Unlike an English pledgee, a lienee has no assignable interest in the property and no right of sale.² Further, unlike pledge, execution cannot be levied against the property he is holding, for his debts.³ Nevertheless, it has always been the case that lien has been good in the debtor's insolvency.⁴ The question of effectiveness against singular successors does not seem to have attracted discussion, but one modern writer begins his treatment of possessory in security in England, by writing that "the pledge and the lien both . . . give the creditor a legal interest which runs with the goods."⁵ Further, older authority stating that a pledgee has a special property in the security subjects but a lienee does not, has been questioned in the House of Lords.⁶ From the Scottish perspective, the English lien appears to be real rather than personal.

In Quebec lien seems to be real, because the Civil Code provides that the right "may be set up against anyone".⁷ In Dutch law, lien is enforceable against the debtor's creditors and singular successors, but not other third parties.⁸ French law is to the

same effect. Planiol states that lien "is not an exception purely personal",⁹ being valid against creditors and successors. However, he refuses to accept that it is a real right. He compares it to the exception *rei venditae et traditae* in Roman law, where a buyer could stop the seller getting the thing back from him after the sale.¹⁰ The exception was good against the seller and all those who had acquired rights from him in the property since the sale. However, to the present writer, the right of the buyer here stems from the fact that he has *dominium*.

South African law makes a distinction between enrichment liens which are real and debtor and creditor liens which are personal.¹¹ Both types are effective in the debtor's insolvency.¹² A debtor and creditor lien, however, is only good against a singular successor who is aware of its existence.¹³ German law has a fixed list of real liens (*gesetzliche Pfandrechten*) including those of the carrier, factor and storekeeper.¹⁴ Additionally, a personal lien (*Zurückbehaltungsrecht*) exists in any situation where a debtor has a claim against the creditor which is due and arises out of the same legal relationship from which the creditor's claim comes.¹⁵

1. *Halsbury*, vol 28, para 519; *A P Bell*, p 136.

2. *Ibid*; *Donald v Suckling* (1866) LR 1 QB 585; *Halliday v Holgate* (1868) LR 3 Ex 299.

3. *Legg v Evans* (1840) 6 M & W 36; 151 ER 311.

4. See, for example, *Rushforth v Hadfield* (1805) 6 East 519; 102 ER 1386.

5. *A P Bell*, p 136.

6. *The Odessa* [1916] 1 AC 145, at 158-159 per Lord Mersey.

7. Civil Code of Quebec, art 1593.

8. J G Sauveplanne, "Security over Corporeal Movables according to Dutch Law", in J G Sauveplanne (ed), *Security over Corporeal Movables* (1974), p 163, at pp 170-171.

9. M Planiol, *Civil Law Treatise*, vol 2, (1959), s 2536.

10. *Ibid*; D.21.3.3.1.

11. T J Scott, *LAWSA*, vol 15, paras 98-136.

12. *Ibid*, paras 132-133.

13. *Ibid*, para 121.

14. F Lent, *Sachenrecht : Ein Studienbuch*, (14th ed, by K H Schwab, 1974), p 261; F Baur, *Lehrbuch des Sachenrechts*, (13th ed, 1985), pp 539-540.

15. BGB, art 273; E J Cohn, *Manual of German Law*, vol 1, para 210; G H Treitel, *Remedies for Breach of Contract*, (1988), pp 313-317.

199. Lien and retention. The distinction between retention and lien was not finally settled until the middle of the last century.¹ Both are forms of security. The difference is that a creditor with a right of retention has ownership of the security subjects.² In lien, ownership lies with the debtor. To reiterate, in the words of Lord President McNeill :

"A lien is a security held by a person over effects, the real right of property or *jus dominij* of which belongs to another property . . . a right of retention is a security held by a person over effects, the real right of property or *jus dominij* of which is vested in himself."³

Thus only lien is a subordinate real right.⁴ As a creditor with a right of retention has *dominium* he is entitled to withhold the property from the debtor until all sums owed to him are paid.⁵ A creditor with a lien only has security to the extent of his special or general lien.⁶

1. See *Brown v Sommerville* (1844) 6 D 1267; *Melrose and Co v Hastie* (1851) 13 D 880 and *Laurie & Co v Denny's Tr* (1853) 15 D 404.

2. *Gloag and Irvine*, chapter 10, especially p 340; D L Carey Miller, *Corporeal Moveables in Scots Law*, (1991), para 11.16; *Gladstone v McCallum* (1896) 23 R 783, 785 per Lord McLaren.

3. *Wyper v Harveys* (1861) 23 D 606, 620.

4. See generally, G L Gretton, "The Concept of Security" in D J Cusine (ed), *A Scots Conveyancing Miscellany*, (1987), p 126.

5. See the authorities cited in n 1 and *Carey Miller*, para 11.17.

6. See generally, below paras 204-211 and 236-243.

200. Transfer of the real right. The real right of lien does not appear to be generally assignable. English law is clear that this is the case.¹ In Scotland, although there is no definitive authority, that which does exist points to a similar conclusion.

In one case, it was held that an individual who pays the expenses of a judicial remit to an accountant does not have transferred to him the accountant's lien over the report.² In another decision, it was held that the hotelier's lien was not transferred to an individual who had paid a guest's bill and collected property which the guest had left at the hotel.³ As regards the banker's lien, Shaw writes :

"The right of lien competent to a banker being a contract arising from the contract of agency in which there is *delectus personae* cannot be transferred by the lien-holder. He may assign the debt, but is not entitled to deliver the subject of the lien to the assignee. He holds such subject as agent for the customer, and the contract of agency cannot be transferred without the consent of the customer."⁴

Thus the only person that the lien may be assigned to is another banker, if the customer agrees that the contract of agency be transferred. A similar rule is accepted by Begg and Gloag and Irvine as applying to the lien of the solicitor.⁵ Thus the circumstances in which an individual may assign his lien in Scots law are very limited, being only where the assignee is to act in the same capacity for the debtor as the assigner did prior to the assignment.

In contrast, it would seem settled that the lien may be transferred by judicial assignation, upon the death or sequestration of the lien-holder.⁶

1. *A P Bell*, pp 136-137; *Legg v Evans* (1840) 6 M & W 36; 151 ER 311.

2. *McQueen v Dickie* (1851) 13 D 502.

3. *Garden v Shaw* (1874) 1 Guth Sh Cas 505.

4. *Shaw*, p 69.

5. *Begg*, p 207; *Gloag and Irvine*, p 393. See also Lord Cuninghame in *Renny v Kemp* (1841) 3 D 1134 at 1140 and Lord Balgray in *Inglis v Renny* (1825) 4 S 113 at 114.

6. *Wilson v Lumsdaine* (1837) 15 S 1211, *Paul v Meikle* (1868) 7 M 235 (death); *Paul v Dickson* (1839) 1 D 867, *Inglis v Moncreiff* (1851) 13 D 622 (sequestration).

9. ENFORCEMENT AND EXTINCTION

201. Enforcement in general. As has been made clear elsewhere, the main way in which lien acts as a security is by preventing the debtor from recovering his property until he has discharged the debt he owes to the lien-holder.¹ However, there remains the matter of what can be done if the debtor seems unlikely ever to make payment. At common law a factor has power to sell his principal's goods in order to satisfy the debt which his lien secures.² By statute an innkeeper has a right to sell any goods subject to his lien to meet his guest's bill.³ An unpaid seller also has a right of resale.⁴ In all other cases a lien-holder has no automatic right of sale, unless he holds under a contract giving him such a right.⁵

With regard to marketable commodities it seems accepted that the lien-holder may apply to court for a warrant of sale.⁶ If the subject of the lien will become valueless if it is not converted into money expeditiously then the court may order it to be sold on the application of the owner, even where the lien-holder objects.⁷ In that case the lien-holder will have reserved to him a preference over the price.⁸

With regard to documents such as title deeds and the accounts of a business, it is widely accepted that a court will not authorise a sale.⁹ The reason for this is usually said to be that such things are of no commercial value.¹⁰ This may be accepted as correct, but it is felt that a further ground is because many documents, for example wills (prior to the testator's death) are confidential and it would not be reasonable to place them on the public market. It is universally agreed that a solicitor may not sell his client's papers in order to discharge his account.¹¹

1. See above, para 163.

2. Bell, *Commentaries*, II,91; Bell, *Principles*, s 1417; *Broughton v Stewart, Primrose & Co*, 17 Dec 1814, FC.

3. Innkeepers Act 1878 (c 38). See *Gloag and Irvine*, p 399 and below, para 233.

4. Sale of Goods Act 1979 (c 54), s 39(1)(c) and s 48.

5. Bell, *Commentaries*, II,91; W M Gloag, *Encyclopaedia*, vol 9, para 487; A J Sim, *SME*, vol 20, para 73.

6. Bell, *op cit*, n 2; *Gibson and Stewart v Brown & Co* (1876) 3 R 328.

7. *Parker v Brown & Co* (1878) 5 R 979.

8. *Ibid.*

9. Bell, *Principles*, s 1417; *Gloag and Irvine*, p 359; A J Sim, *SME*, vol 20, para 73.

10. *Ibid.*

11. See for example, *Ferguson and Stuart v Grant* (1856) 18 D 536; *Duffy's Trs v A B & Co* (1907) 23 Sh Ct Rep 94. See below, para 271.

202. Enforcement in insolvency. A lien-holder is regarded as a secured creditor in the event of the debtor's insolvency.¹ Such an occurrence will not really affect a person who has a lien over marketable commodities. He may apply for a warrant of sale as before, but instead of making over any surplus which the sale realises to the debtor, he will give it to the trustee in sequestration or liquidator.

With respect to documents, the position is slightly different. The trustee-in-sequestration or liquidator may order the lien-holder to deliver up any document.² However, in that situation his preference over the debtor's estate is preserved.³ The cases on this area of law invariably involve the solicitor's lien, but the provisions of the relevant statute are general and not specific to solicitors.

The person releasing a document does not require expressly to reserve his preference.⁴ On the other hand the preference does not arise merely by surrendering the documents : the erstwhile custodian must prove that his lien was a valid one.⁵ The preference extends over the whole estate, making its inter-relation with other preferential debts a complicated matter which it is not proposed to enter into here.⁶ If the trustee in sequestration or liquidator decides that he does not want the documents in question, then the lien-holder will not get a preference.⁷ The fact that extracts of title deeds from Register House are now regarded to be equivalent to the originals means that solicitors no longer are likely to secure a preference because the trustee or liquidator requires the title deeds to go about his task.⁸

1. Bankruptcy (Scotland) Act 1985 (c 66), s 73(1).

2. Bankruptcy (Scotland) Act 1985 (c 66), s 38(2); Insolvency (Scotland) Rules 1986, SI 1986/1915, r 4.22(4).

3. *Ibid.*

4. *Adam and Winchester v White's Tr* (1884) 11 R 863, at 865 per Lord President Inglis; *Garden Haig-Scott and Wallace v Stevenson's Tr* 1962 SC 51.

5. *Rorie v Stevenson* 1908 SC 559.

6. *Paul v Mathie* (1826) 4 S 420; *Miln's JF v Spence's Trs* 1927 SLT 425. See A J Sim, *SME*, vol 20, paras 98-99.

7. *Ure & Macrae v Davies* (1917) 33 Sh Ct Rep 109.

8. Conveyancing and Feudal Reform (Scotland) Act 1970 (c 35), s 45. The matter is discussed at para 267.

203. Extinction. The following is a list of circumstances in which a lien will be extinguished. It is not intended to be exhaustive.

(a) Discharge of the obligation secured. As a lien is parasitic upon the obligation which it secures, the discharge of that obligation will extinguish the lien.¹

(b) Destruction of the subject matter of the lien.

(c) Confusion. If the lien-holder becomes owner of the subject matter, then the lien will no longer exist.

(d) Renunciation. The lien will be extinguished if the lien-holder renounces his right of retention.

(e) Loss of custody of subject matter. Lien generally depends on the continuous detention of the property or the right will be lost. This subject has been examined in depth elsewhere.²

(f) Taking another security or a bill. Depending on the circumstances the lien may be extinguished by the lien-holder being given another security.³ In exceptional circumstances the taking of a bill from the debtor will indicate that the lien-holder has waived his right.⁴

(g) Court order. Lien is subject to the equitable jurisdiction of the courts and can consequently be extinguished by court order.⁵

1. *Gloag and Irvine*, p 360. For South Africa, see T J Scott, *LAWSA*, vol 15, para 134. See also the American Law Institute, *Restatement of the Law of Security*, (1941), s 78.

2. See above, paras 185-187.

3. *Gloag and Irvine*, pp 361-362; W M Gloag, *Encyclopaedia*, vol 9, para 489; *Ayton v Colville* (1705) Mor 6710. English law is to the same effect : see G W Paton, *Bailment in the Common Law*, (1952), p 194. For South African law, see T J Scott, *LAWSA*, vol 15, para 135.

4. *Gloag and Irvine*, p 361. Normally the lien will remain : *Gairdner v Milne & Co* (1858) 20 D 565; *Palmer v Lee* (1880) 7 R 651.

5. See above, para 164.

10. SPECIAL LIEN

204. General. The traditional approach since Bell has been to view special lien as arising out of the principle of the mutuality of contractual obligations.¹ To put it another way, a special lien may be seen in terms of the *exceptio non adimpleti contractus*.² This is true in the sense that in Scots law a special lien may, if the circumstances are right, arise under any contract rather than being confined to certain categories of contract as in England.³ However, for two very important reasons, this only gives a partial picture.

Firstly, special lien is a doctrine of the law of obligations and not merely part of the law of contract.⁴ The exact obligational circumstances in which a special lien will arise have been examined previously.⁵ What has been shown as required is one party holding the property of another under an obligation to return it. Where the other party in turn owes an obligation to the holder which is connected to the property, the holder has a lien until that obligation is performed. For example, a storekeeper has a duty to return goods to their owner when requested. However, if the owner has not yet paid the storage charges in respect of the goods, the storekeeper may retain the property until he does so.⁶

Secondly, special lien being a real right, is also part of the law of property.⁷ It is a right which may be enforced not only against the debtor, but against his creditors and singular successors.

In this section, special lien will be examined. This will be followed by a study of two specific types of special lien : that of the carrier and the hotelier.⁸

1. Bell, *Commentaries*, II.92-93; Bell, *Principles*, ss 1411 and 1419; *Gloag and Irvine*, pp 349-351; *Shaw*, pp 55-57; W M Gloag, *Contract*, (2nd ed. 1929), p 630; W W McBryde, *Contract*, (1987), paras 14.46-14.47; A J Sim, *SME*, vol 20, paras 75-76.

2. For an excellent analysis of the *exceptio*, see G H Treitel, *Remedies for Breach of Contract*, (1988), pp 299-317.

3. On the English law, see *Halsbury*, vol 28, para 534-541. The term for "special lien" in English law is "particular lien".

4. See above, para 168.

5. See above, paras 169-171. In the case of enrichment liens, the basis of the right is the *exceptio doli* of Roman law : see above, paras 120-123 and 128.

6. *Laurie v Denny's Tr* (1853) 15 D 504.

7. See *Harper's Creditors v Faulds* (1791) Bell's Octavo Cases 440, at 472 per Lord President Campbell and, above, paras 193-197.

205. The meaning of "special". A special lien is said to be "special" because the security which it gives is special to the obligation which gives rise to the lien.¹ For example, the lien of a garage for repairs to a car may be invoked until the customer pays the repair bill. It may, however, not be invoked in order to secure the payment of any other debt owed by the customer, such as for petrol bought the previous week.² If the lien-holder does retain the property in respect of such an extrinsic debt, he will be liable in damages to the owner of the property.³

It was at one time submitted in Scots law, most notably by Professor More, that in any situation where one party was legitimately in possession of the property of another that he had a right of retention for all sums due to him by that party.⁴ To accept such is to regard special lien as not being part of Scots law and this was indeed Professor More's contention :

"... the original principle of retention, as held in our law, has been thrown into a state of embarrassment and confusion, by an attempt to assimilate it to the English doctrine of *lien*".⁵

This statement has a measure of truth in it.⁶ However, as regards the substance of the matter, Professor More's account of the law is not correct because it fails to distinguish between retention based on ownership and retention based on custody/possession (lien).⁷ The former permits retention for all sums.⁸ The latter does not.⁹ This point has been made on a number of occasions by the courts and the matter may be regarded as beyond doubt.¹⁰

A special lien is so closely viewed as merely securing the obligation in terms of which it arises, that it does not extend to the cost of storing the property being detained.¹¹ This rule, of course, may be varied by express contract.¹² Similarly, the lien does not extend to the costs of recovering the debt which it secures.¹³

1. Bell was responsible for introducing the terminology to Scotland. See, above, paras 158-159.

2. *Carntyne Motors v Curran* 1958 SLT (Sh Ct) 6.

3. *McNair v Don* (1932) 48 Sh Ct Rep 99.

4. More, *Notes to Stair's Institutions*, cxxxi. See too the arguments of the losing sides in *Harper's Creditors v Faulds* (1791) Bell's Octavo Cases 440; *Stuarts and Fletcher v McGregor and Co* (1829) 7 S 622; *Reid v Watson* (1836) 14 S 223; *Brown v Sommerville* (1844) 6 D 1267 and *Laurie v Denny's Tr* (1853) 15 D 404.

5. More, *ibid.*, at cxxxiv.

6. Thus not all the law which Bell sets out in his *Commentaries* and *Principles* is in fact justified in terms of Scottish principle, for example, his account of the innkeeper's lien.

7. *Gloag and Irvine*, pp 353-354; W M Gloag, *Contract*, (2nd ed, 1929), p 633; W M Gloag, *Encyclopaedia*, vol 9, para 462.

8. *Gloag and Irvine*, p 330; *Dougal v Gordon* (1795) Mor 851 and 2067; *Balleny v Raeburn* (1808) Mor App voce Compensation, No 5; *Hamilton v Western Bank* (1856) 19 D 152; *Nelson v Gordon* (1874) 1 R 1093. But cf *Moor v Atwal* 1995 SCLR 1119.

9. See above, para 199 and the cases cited in note 4.

10. See the authorities referred to in the previous two notes and *Gladstone v McCallum* (1896) 23 R 785, at 785, per Lord McLaren. In *Laurie v Denny's Tr* (1853) 15 D 404, at 410, Lord Ivory said of the distinction: "I hope this will be the last time we will have to travel over the authorities to affirm a principle which has now taken deep root in our system, whatever may have been the law formerly."

11. *Stephen & Sons v Swayne & Bovill* (1861) 24 D 158; *Carntyne Motors v Curran* 1958 SLT (Sh Ct) 6. But cf W A Wilson, *The Law of Scotland on Debt*, (2nd ed, 1991), para 7.8.

12. *Bon Accord Removals v Hainsworth* 1993 GWD 28-1785.

13. W M Gloag, *Encyclopaedia*, vol 9, para 480: *Garscadden v Ardrossan Dry Docks Co* 1910 SC 178.

206. Circumstances in which the lien arises : the orthodoxy. Historically, a distinction has often been made in respect of the property over which a special lien may extend.¹ That distinction is a two-fold one and is set out by Gloag and Irvine.² Firstly, there is property which has been improved by the work of the lien-holder. Secondly, there is property which has not been worked upon but which is in the hands of the lien-holder in terms of the obligation which gave rise to the lien.

1. *Gloag and Irvine*, pp 350-352; A J Sim, *SME*, vol 20, paras 76-77; *Brown v Sommerville* (1844) 6 D 1267, discussed below.

2. *Gloag and Irvine*, *ibid*.

207. Category one. There has never been any doubt that a lien will arise in the first category. This much was made clear by both Bankton¹ and Erskine,² not to mention Bell.³ Such a right has been held to exist in respect of the following : bleached cloth;⁴ repaired cars;⁵ repaired ships;⁶; repaired aircraft;⁷ plans drawn up by an architect;⁸ and land which has been improved.⁹ Gow gives his own colourful example :

"The television set, with its beguiling sagas, must languish in [the] shop until the price of the new picture tube has been paid."¹⁰

1. *Bankton*, I,17.15.

2. *Erskine*, III,4.21. See also *Voet*, 16.2.20.

3. Bell, *Commentaries*, II,100; Bell, *Principles*, s 1430.

4. *Harper's Creditors v Faulds* (1791) Bell's Octavo Cases 440. It now seems accepted that bleachers have a general lien upon usage of trade for the year's account : *Anderson's Tr v Fleming* (1871) 9 M 718.

5. *Carntyne Motors v Curran* 1958 SLT (Sh Ct) 6.

6. *Barr & Cooper v Shearer* (1875) 2 R (HL) 14; *Ross & Duncan v Baxter & Co* (1885) 13 R 185.

7. *Sun-Air of Scandinavia A/S v Caledonian Airborne Engineering* 8 August 1995, (OH), unreported.

8. *Lindsay v Mackenzie* (1883) 2 Guth Sh Cas 498.

9. *Binning v Brotherstones* (1676) Mor 13401.

10. J J Gow, *The Mercantile and Industrial Law of Scotland*, (1964), p 293.

208. Category two : (a) the decision in *Brown v Sommerville*. This category has proved more problematic. It was held in the important case of *Brown v Sommerville*,¹ that a special lien will only come into existence where work has been done to the property in question, as in the first category above. There, a printer had been given stereotype plates in order that he could print a periodical work entitled *Wilson's Tales of the Borders*. He sought subsequently to retain the plates until his account was paid. The majority of the court, reversing the Lord Ordinary, denied him a lien on the ground that no work had been done on the plates themselves. In the words of Lord Justice-Clerk Hope :

"[The printer's] workmanship - the product of his skill and labour as an artificer, is the printed work - producing on paper that which is to be sold. That, it is admitted, he is entitled to retain until paid for. But on the plates he has bestowed no labour. They are not improved in value by his work - quite the reverse."²

This is a very succinct statement of the law. What is unfortunate, is that it is a statement of the law of England and not Scotland. The majority of the court were in fact influenced by English law when making their decision.³ In that jurisdiction since the Middle Ages it has been accepted that special, or more correctly, particular lien, has been limited to three main categories.⁴ Firstly, the law confers a lien upon an unpaid seller.⁵ This lien is of course now statutory.⁶ Secondly, a lien may arise out of public duty, as in the case of the liens of the common carrier and hotelier.⁷ Thirdly, a lien arising in respect of property upon which work has been done and which has been improved by that work.⁸ Thus, leaving the common carrier, hotelier and unpaid seller aside, English law does not countenance a lien except in respect of property improved by the lien-holder. The application of the rule leads to results which are difficult to justify. For example, a trainer of horses but not a livery stable keeper is entitled to lien, because only the former is regarded as making the horse more valuable.⁹

Scots law does not and never did follow the English rule. In *Stewart v Stevenson*,¹⁰ a case decided sixteen years before *Brown* it was held that an accountant had a right to retain documents placed in his hands for the purpose of drawing up a report, until paid his fee. The fact that the accountant did not work on the papers themselves was irrelevant. As Lord Moncreiff, who dissented in *Brown*, pointed out, our law "has been established on principles perfectly distinct"¹¹ from the law in England. The relevant principles are civilian and to make the point, Lord Moncreiff makes reference to the following passage from the judgement of the Lord President in *Harper's Creditors v Faulds* :

"I conceive [retention] to mean a right of refusing delivery of a subject, till the counter obligation under which the subject was lodged be performed. It is acknowledged by all our authors and decisions, mutual obligations must be performed *hinc inde*".¹²

On this sound basis, the printer had every right to retain the plates until paid in terms of the contract under which he received them.

1. (1844) 6 D 1267.

2. *Ibid*, at 1278.

3. See *Gloag and Irvine*, p 352, note 2. The English case in question was *Bleadon v Hancock* (1829) 4 Car & P 152; 172 ER 648, a decision of Chief Justice Tindal.

4. See above, paras 132 and 139. The American Law Institute, *Restatement of the Law of Security*, (1941), s 61, also contains a fixed list of special liens.

5. See above, para 131.

6. Sale of Goods Act 1979 (c 54), ss 39(1)(a) and 41.

7. See *Halsbury*, vol 28, paras 535-536.

8. *Ibid*, paras 537-541. The American Law Institute, *Restatement of the Law of Security*, (1941), s 61(a) confers a lien where work has been done or materials added to the property. It is not necessary that the thing be actually improved.

9. Cf *Bevan v Waters* (1828) 3 Car & P 520; 172 ER 529 and *Forth v Simpson* (1849) 13 QB 680; 116 ER 1423 with *Jackson v Cummins* (1839) 5 M & W 342; 151 ER 145.

10. (1828) 6 S 591.

11. *Op cit* n 1 at 1281-1285.

12. *Harper's Creditors v Faulds* (1791) Bell's Octavo Cases 440, at 471.

209. **Category two : (b) authority subsequent to *Brown*.** The majority decision in *Brown* must be regarded as wrong in principle. At any rate, the decision is now regarded as being consigned to history by a consistent series of later cases.¹ The first of these was *Meikle and Wilson v Pollard*,² decided in 1880. There a merchant had placed certain documents in the hands of a firm of accountants to enable them to collect debts for him. It was held that the firm had a right to retain the documents until its bill was paid for this service. The fact that no work was done on the papers themselves was irrelevant. As Lord Young stated :

"There is a counterpart in every contract, and here it is that the man of business is not entitled to get his money until he gives up the books, and his employer is not entitled to get his books till he pays the money. These are obligations *hinc inde* prestable by both parties."³

The decision in *Meikle and Wilson* was recognised as being valid in two Sheriff Court cases decided shortly afterwards.⁴ Further, it was heavily relied upon in the case of *Robertson v Ross*,⁵ decided in 1887. There an estates factor had handed to him by a landed proprietor documents which the factor required to carry out his factorial duties. It was held that the factor had a lien over the papers until paid. Lord Young gave a similar judgement in this case.⁶ Lord Rutherford Clark concurred, but not without expressing some doubt. He said he was "bound"⁷ to follow the previous case, adding :

"I think it right, however, to say that, so far as I can judge, the decision in *Meikle's* case was an entirely new departure. If the law laid down there is sound, we should never have heard of the law-agent's hypothec as an exceptional right."⁸

To this statement, two things may be said. Firstly, there was more of a return than a departure, with the law returning to its civilian roots after dallying with English principle. Secondly, the law-agent's hypothec, or as it is now known, the solicitor's

lien is an exceptional right when compared with the liens in *Meikle and Wilson* and *Robertson*. It is a general lien, whereas they are special liens.⁹

Later years have seen further contract cases enunciating the principle that special lien arises out of mutual obligations.¹⁰ The latest relevant decision is *National Homecare Ltd v Belling & Co Ltd*.¹¹ There the defender had entered into an agreement with the pursuer whereby the latter was to deliver and install the former's equipment. The defender went into receivership. The pursuer sought declarator as to its entitlement to exercise a special lien over the equipment it held, until paid under the contract. Lord Penrose in the Outer House engaged in a comprehensive review of the previous cases in this area, noting in particular that *Brown v Sommerville* was now considered as wrong.¹² He agreed with the submission of counsel for the pursuer that "special lien depends upon and is part of the law of mutual contract".¹³ Thus the equipment could be retained by the pursuer in security of payment.

1. See *Gloag and Irvine*, pp 351-352; Sheriff Guthrie in Bell's *Principles*, s 1430, note (d); W M Gloag, *Contract*, (2nd ed, 1929), p 631; W M Gloag, *Encyclopaedia*, vol 9, para 461; W W McBryde, *Contract*, (1987), para 14.46.

2. (1880) 8 R 69.

3. *Ibid*, at 72. The other judges in the case, Lord Justice-Clerk Moncreiff and Lord Gifford, use the term "lien" to mean only "general lien". Thus, Lord Gifford states at 71 : "this is not a case of lien. It is simply a case of the retention of a subject . . . under a contract." See too Lord Justice-Clerk Moncreiff in *Robertson v Ross* (1887) 15 R 67, at 70. This approach has not been taken subsequently : see *Gow*, p 294.

4. *Lindsay v Mackenzie* (1883) 2 Guth Sh Cas 498; *Morrison v Watson* (1883) 2 Guth Sh Cas 502.

5. (1887) 15 R 67.

6. *Ibid*, at 71-72.

7. *Ibid*, at 72.

8. *Ibid*.

9. On the solicitor's lien, see *Gloag and Irvine*, pp 384-395 and below, paras 265-271.

10. *Moore's Carving Machine Co v Austin* (1896) 33 SLR 613; *Findlay v Waddell* 1910 SC 670; *Paton's Trs v Finlayson* 1923 SC 872.

11. 1994 SLT 50.

12. *Ibid*, at 53.

13. *Ibid.*, at 52.

210. Gloag and Irvine's categorisation reanalysed. The result of the line of authority beginning with *Meikle and Wilson* is that it cannot be doubted that a special lien will arise in Gloag and Irvine's second category, i.e. where work has not been actually done on the property being detained. The more fundamental point is whether there is any value in making a distinction between special liens in respect of, firstly, property worked upon and, secondly, property which the lien-holder required to fulfil his obligations, but did not actually improve. There may be some merit at a factual level. Beyond that, however, the division has little to commend it, particularly if one returns and looks at Gloag and Irvine's categorisation more closely.

The first category is defined as "where the subject retained is actually enhanced in value by the work bestowed upon it".¹ Tailors, watchmakers and ship carpenters who have carried out repairs, millers and bleachers are placed in this category.² Their inclusion cannot be questioned. However, Gloag and Irvine thereafter "on the same principle"³ proceed to add carriers, storekeepers, wharfingers and salvors. Their list is completed through "perhaps a slight extension of [the] rule"⁴ with innkeepers. With the arguable exception of salvors,⁵ none of these further individuals can be said to "enhance" the value of the property by "work bestowed upon it". Carriers carry. Storekeepers store, as do wharfingers. Innkeepers provide accommodation.

What Gloag and Irvine try to do is unfortunately not possible. They try to fit liens into an English classification which do not and cannot belong there. Under English law the common carrier and innkeeper/hotelier have a particular lien arising out of their public duties. It is in this category of particular lien where they belong.⁶ Storekeepers and wharfingers have nothing akin to a special lien in English law, although they may have possibly a general lien based on usage of trade.⁷ The English case which Gloag and Irvine cite to justify the proposition that wharfingers have a special lien makes precisely this point.⁸ In Scotland it has never been doubted that storekeepers have a special lien.⁹

The conclusion from this is that carriers, hoteliers, storekeepers and wharfingers should have been placed in Gloag and Irvine's second category, that is where the property subject to the lien "was delivered and received only as a means to the performance of the contract".¹⁰ A more radical approach would be to depart from the author's categorisation completely. There is much to be said for such a departure. To recognise a distinct category of special lien where the subject has been improved is to give an account of English rather Scots law. In our jurisdiction such special liens are treated in the same way as any special lien in contract as arising out of the mutuality of contractual obligations.¹¹ In other words the lien-holder's duty to return the property is the counterpart to the obligation which the lien secures. The matter of whether property has been improved under a contract is irrelevant.¹²

1. *Gloag and Irvine*, pp 350-351.

2. *Ibid.* Authority is cited in support, although in the case of tailors, watchmakers and millers the authority is English.

3. *Gloag and Irvine*, above, note 1.

4. *Ibid.*

5. In South African law, the salvor's lien is treated as an enrichment lien : see T J Scott, *LAWSA*, vol 15, para 106 and *Brooklyn House Furnishers (Pty) Ltd v Knoetze and Sons* 1970 3 SA 264 at 271 per Botha JA.

6. See above, para 132.

7. *Halsbury*, vol 28, para 525.

8. *Moet v Pickering* (1878) 8 Ch D 372.

9. *Laurie v Denny's Tr* (1853) 15 D 504.

10. *Gloag and Irvine*, p 351.

11. See, for example, W M Gloag and R C Henderson, *The Law of Scotland*, (10th ed, 1995), at para 19.21 : "It is immaterial that no work has actually been done on the article over which the lien is claimed". But cf Lord McLaren in *Gladstone v McCallum* (1896) 23 R 783, at 785. In South African law, a distinction is made. Where work has been done, an enrichment lien will arise. This is a real right. In other relevant cases, a debtor-creditor lien will arise. This is a mere personal right. See T J Scott, *LAWSA*, vol 15, paras 98-136.

12. This certainly is the position under the Civil Code of Quebec (art 1592), where a party holding the property of another under a contract has a lien in respect of a claim which is "exigible and is directly related to the property of which he has detention". See too French law : M Planiol, *Civil Law Treatise*, vol 2, (1959), ss 2520-2521.

211. Special lien for damages. An exceptional instance of special lien is a right to retain property in security of a claim for damages.¹ The principal case in this area is *Moore's Carving Machine Co v Austin*.² There a commission agent was appointed by a company to sell carving machines. He was given a show machine which was fitted up in his premises. The company ran into difficulties and was unable to supply the agent with the machines. It was held that the company was in breach of contract and that the agent could retain the show machine until he received damages. The *quantum* was the expense which the contract had cost the agent. This amount consisted of costs in relation to the machine and travelling expenses.

In a subsequent Sheriff Court case, involving another agent, it was held that samples belonging to his employer could be retained in security of a claim for damages for wrongful dismissal.³ As Gloag and Irvine point out, allowing a special lien for damages coheres with the long established rule that a contracting party may withhold payment of a debt due by him under a contract until he receives damages for breach of that contract.⁴

It has been held in two cases that where a buyer under a contract for the sale of goods rejects the goods because they are disconform to the contract, that he has no right to retain them until he receives damages.⁵ *Padgett & Co v McNair & Brand*⁶ was decided in 1852. *Lupton & Co v Schulze & Co*⁷ was decided in 1900, after the Sale of Goods Act 1893 had come into force but similar principles were applied. It is felt that these decisions are open to question. *Padgett* was decided well before the line of cases beginning with *Meikle and Wilson v Pollard* which established that special liens arise out of mutual obligations under contract.⁸ It also pre-dated the case of *Moore's Carving Machine Co* which admitted a special lien in security of a claim for damages. Further, the judges in *Padgett* took cognisance of English authority.⁹

The judicial concern intimated in *Padgett* that allowing retention would be "unfair" to the seller does not seem justified, given that lien is an equitable right with which a court can interfere in extreme cases.¹⁰ The seller after all is no innocent : he is in breach of contract. It is interesting to note that in *Lupton* that Lord Moncreiff says :

"There may perhaps be exceptional cases in which, after a purchaser has rejected goods as not being conform to contract, he may be entitled to retain and use them, claiming damages in respect of defects in quality. As to such cases, I reserve my opinion."¹¹

This statement begins to go a little along the road towards what the law should be regarded as. We await future decisions.

1. See *Gloag and Irvine*, p 353; W M Gloag, *Contract*, (2nd ed, 1929), p 632; W M Gloag, *Encyclopaedia*, vol 9, para 479; W W McBryde, *Contract*, (1985), para 14-47; A J Sim, *SME*, vol 20, para 77.

2. (1896) 3 SLR 613.

3. *Marshall v Boyle* (1890) 2 Guth Sh Cas 401.

4. *Gloag and Irvine*, pp 353 and 306-307; *Kilmarnock Gas Light Co v Smith* (1872) 11 M 58; *Turnbull v McLean & Co* (1874) 1 R 730.

5. See W M Gloag, *Contract*, (2nd ed, 1929), p 632.

6. (1852) 15 D 76.

7. (1900) 2 F 1118.

8. See the preceding paragraphs.

9. See Lord Justice-Clerk Hope at (1852) 15 D 76, at 80 and Lord Wood at 83.

10. See in particular Lord Justice-Clerk Hope at 81-82. On lien as an equitable right, see above, para 164.

11. (1900) 2 F 1118, at 1123.

11. CARRIER'S LIEN

212. General. It is possible to treat the carrier's lien as a unitary subject.¹ Nevertheless, it is the case that there are some specialities depending on the manner of carriage, for example by sea, and these will be given due examination also.² The carrier's lien is a relatively undeveloped subject in Scotland, leading to reliance often being placed upon English authority.³ It is fair to say, however, that the borrowing of authority here has not caused the trouble that was brought about when

the same thing was done in relation to the hotelier's lien.

1. Bell, *Commentaries*, II,94; Bell, *Principles*, s 1422; Gloag and Irvine, p 400.

2. See below, paras 219-221. The accounts cited in note 1 consider in detail the particular rules relating to carriage by sea and by land.

3. See, for example, *Gloag and Irvine*, pp 400-403.

213. History. In England, the common carrier was one of the earliest individuals to be given a lien by the law.¹ Like the innkeeper, he was given it because of his public duty to accept goods for carriage and his strict liability if any harm became of them. Scots law developed somewhat differently. In the late seventeenth century it was recognised that a shipowner had a hypothec over the cargo for freight.² Being a hypothec, the right was not dependent on possession.³ Bankton, however, viewed the hypothec in limited terms conferred by the law in favour of the owners and masters of ships.⁴ He stated that it could only be enforced up to 15 days after delivery of the goods and, at least in terms of the maritime law of France, was defeated by a third party acquiring for value. Further, he opined :

"I doubt if [the master]⁵ has any other privilege by our law, than that of retention, while the goods are in the ship, in lighters, or on the key".⁶

Thus the right in question can be analysed as a lien, which is replaced by a hypothec on delivery, which lasts for 15 days. Erskine, on the other hand, baldly asserts that the right is one of hypothec.⁷ Equally simply, but quite differently, Voet recognised the right in terms of retention.⁸

In the case of *Bogle v Dunmore & Co*,⁹ decided in 1787, there was no reference to hypothec but only to the right of a maritime carrier to detain for freight. Similarly, in the 1814 case of *Malcolm v Bannatyne*,¹⁰ the carrier was only found to have a security over that property which he had not delivered. Thus the case law moved away from sanctioning a hypothec in respect of freight, recognising instead a lien.

When Bell came to deal with the matter in his *Commentaries*, he began by noting that Roman law conferred a right to retain in respect of carriage in terms of the *actio*

contraria of the contract *locatio operis mercium vehendarum*.¹¹ He then pointed out that English law gave common carriers a lien because of their public duty to accept goods for carriage without enquiring into who owns them, the lien being enforceable against the owner. Bell concludes :

"In the Scottish jurisprudence, both principles may be held to combine in favour of a lien for the price of carriage."¹²

The statement may be seen as fair. As might be expected, there is far more English authority to rely on than authority from anywhere else. It is certainly beyond doubt that the right in question is one of lien. Referring to carriage by sea, Bell states :

"Delivery of the goods divests the shipmaster of his lien, for it subsists only by possession."¹³

Bell's treatment is accepted by other writers, for example Hume.¹⁴ Other than by Gloag and Irvine, the carrier's lien has not been subject to detailed treatment by Scottish writers.¹⁵ The case law on the subject cannot be said to be large in amount either.¹⁶ Nevertheless, the lien is an important one, with similar rights being recognised in other jurisdictions, such as France,¹⁷ Germany,¹⁸ Italy,¹⁹ Louisiana,²⁰ Quebec,²¹ and South Africa.²²

1. See above, paras 131-132; Sir William Holdsworth, *History of English Law*, vol 7, pp 511-512; *A P Bell*, p 138. See too the American Law Institute, *Restatement of the Law of Security*, (1941), pp 168-169.

2. *Muire v Lord Lyon* (1683) Mor 6260.

3. On hypothec, see *Stair*, I.13.14; *Erskine*, III.1.34; Bell, *Commentaries*, II,24-40; *Gloag and Irvine*, chapter 12.

4. *Bankton*, I.17.16. He cites the case of *Lawry*, November 14, 1676.

5. Presumably as agent for the shipowner.

6. *Bankton*, above, note 4.

7. *Erskine*, III.1.34, citing *Muire v Lord Lyon*, above, note 2. But see Nicolson's note (number 30) where he writes that the right is "more properly a right of *lien* or *retention* over the cargo while yet undelivered." He cites Bell, *Commentaries* and *Malcolm v Bannatyne*, 15 Nov 1814, FC, as his authority.

8. Voet, 16.2.20.
9. (1787) Mor 14216.
10. 15 Nov 1814, FC.
11. Bell, *Commentaries*, II,94.
12. *Ibid.*
13. Bell, *Commentaries*, II,97.
14. Hume, *Lectures*, III,47; D M Walker, *Principles of Scottish Private Law*, (4th ed. 1989), vol 3, pp 400-401.
15. *Gloag and Irvine*, pp 400-403.
16. There are in the region of twenty relevant cases, dating from the unreported decision of *Lawry*, November 14, 1676 (*Bankton*, I.17.16) to *Bon Accord Removals v Hainsworth* 1993 GWD 28-1785.
17. In France there exists a priority in favour of a carrier under the Civil Code, Article 2102(6). This is dependent on the carrier continuing to hold the goods : M Planiol, *Civil Law Treatise*, vol 2, (1959), s 2521.
18. In Germany, the carrier has a lien under the HGB, art 440 (*das Pfandrecht des Frachtführers*).
19. Italian Civil Code, art 2761.
20. Civil Code of Louisiana, art 3217(9).
21. Civil Code of Quebec, art 2058.
22. The South African carrier's lien is not a real right : see T J Scott, *LAWSA*, vol 15, para 119; *Standard Bank v Wilman Spilhaus & Co* 1888 (6) SC 15.

214. The lien in practice. Contact has been made with some carriers to ascertain the frequency with which the lien is used today. DHL International's terms and conditions of business contain a clause stating that the company has a lien for the charge of shipping the goods and for any related duties arising out of the transportation. However, their Customer Care Department advise that "this lien is rarely, if ever, relied upon",¹ the normal practice being to recover outstanding debts "through the usual legal channels",² which presumably means raising an action for payment and executing diligence. This would fit in with the rather small body of case law on the subject, as noted in the preceding paragraph.

1. Letter from DHL International (UK) Ltd to the writer, dated 14 November 1996.

2. *Ibid.*

215. **Nature of right.** The carrier's lien is a special lien.¹ If the matter ever was in any doubt, which it surely was not, then it was settled in 1824 by the case of *Stevenson v Likly*.² There, a shipping company was employed to convey goods. During the course of the employment a balance became owed by the shipper to the company. In order to secure the balance the company detained goods consigned to the shipper. It was held by the Court of Session that the company had no right to do this. A carrier could only retain a parcel for the carriage charge in respect of that parcel and not for a general balance. The rule applies equally to land carriage, as Lord President Inglis makes clear in a case which involved a lien under statute :

"At common law the railway company, as carriers, would have been entitled to retain the goods till the carriage or toll applicable to these goods was paid."³

The common law may be clear, but the question remains whether a carrier may obtain a general lien expressly or through usage. Bell, at least in the case of land carriage, appears to accept as much.⁴ On the other hand, Gloag and Irvine were highly sceptical in respect of both types of carriage known in 1897.⁵

The issue may be traced back to English case law of the early nineteenth century.⁶ This was the time at which the English courts were repudiating previous decisions, from judges such as Lord Mansfield, which were in favour of introducing general liens in as many situations as possible. The watershed case, *Rushforth v Hadfield*,⁷ in fact involved a common carrier who claimed a general lien. The Court stated that allowing carriers to have general liens undermined the rules of the common law whereby they were granted a particular⁸ lien in return for their public duties. Accordingly, it was held that in order to establish a general lien, a heavy burden of proof had to be discharged. Nevertheless, the task is not an impossible one.⁹

In Scotland the weight of authority points to the possibility of creating a general lien by agreement with a customer. In the first place, there would have been no need for the nineteenth century legislation restricting the rights of railway companies to

create express general liens, if this was not the case.¹⁰ In the second place, it has been held by the House of Lords that a shipping company can extend its lien to cover dead freight, by agreement with its customer.¹¹ In the third place, in a very recent case it was held by Sheriff Principal Risk that a removal company could create a general lien through express contract.¹²

The problem with the general lien is its prejudicial effect on third parties. The issue was close to the Court's heart in *Rushforth v Hadfield*.¹³ Indeed in the later cases in England where carriers were able to establish general liens, these liens were only admitted on a contractual basis between carrier and customer and were not allowed to affect third parties.¹⁴ In Scotland, Lord Young has seriously doubted whether it is possible for a carrier to create a general lien through either usage or expressly, which can prejudice third parties.¹⁵ If one examines more closely what Gloag and Irvine say in respect of a shipowner contracting for an express lien for freight, it can be seen that what they doubt is that such a lien "would be upheld in a question with the creditors of the shipper".¹⁶ And further, in that recent case, the Sheriff Principal distinguished a previous decision in which a general lien was not upheld against a third party, because there were no third parties involved in the case in hand.¹⁷

The conclusion from the above is that a general lien created in favour of a carrier will *only* operate effectually at a contractual level between him and his customer. Given this, and given further that the term "lien" is consonant with that of "real right", it is felt that the terminology being used is somewhat misleading. Instead of making reference to "general lien", some other label such as "contractual retention for a general balance" should be used. For the sake of clarity, it may be underlined that the special lien which arises by operation of law in favour of a carrier is a real right.¹⁸

1. Bell, *Commentaries*, II,94-97; Bell, *Principles*, ss 1422-1425; *Gloag and Irvine*, p 400; A Mackenzie Stuart, *Encyclopaedia*, vol 3, para 44 (carrier by land) and W G Normand and J G McIntyre in the same work at para 84 (carrier by sea); D M Walker, *SME*, vol 3, para 629 (carrier by land); A J Sim, *SME* vol 20, para 77; C Mackenzie, *SME*, vol 21, para 660 (carrier by sea).

2. (1824) 3 S 291 (NE 204).

3. *North British Railway Co v Carter* (1870) 8 M 998, at 1000. See also Lord Young in *Peebles & Son v Caledonian Railway Co* (1875) 2 R 346, at 348 and Sheriff Berry in *North British Railway Co v Russell* (1895) 11 Sh Ct Rep 241, at 246.

4. Bell, *Commentaries*, II, 97.
5. *Gloag and Irvine*, pp 400 and 402.
6. On which, see *A P Bell*, pp 142-143.
7. (1805) 6 East 519; 102 ER 1386; (1806) 7 East 224.
8. "Particular" is the equivalent term to "special" when discussing liens in English law. See, for example, N E Palmer, *Bailment*, (2nd ed, 1991), pp 943-955.
9. *Oppenheim v Russell* (1802) 3 B & P 42; 127 ER 24; *Rushforth v Hadfield*, above note 7; *Wright v Snell* (1822) 5 B & Ald 350; 106 ER 1219; *Halsbury*, vol 5(1), para 586.
10. Railway and Canal Traffic Act (17 & 18 Vict c 31), s 7, on which, see *Scottish Central Railway Co v Ferguson* (1864) 2 M 781 and *Peebles & Son v Caledonian Railway Co* (1875) 2 R 346.
11. *McLean & Hope v Fleming* (1871) 9 M (HL) 38; *Lamb v Kaselack, Alsen & Co* (1882) 9 R 482.
12. *Bon Accord Removals v Hainsworth* 1993 GWD 28-1785.
13. See (1805) 6 East 519 at p 528; 102 ER 1386 at 1390 per Le Blanc J.
14. See the cases cited in note 9 and G W Paton, *Bailment in the Common Law*, (1952), p 274.
15. *Peebles & Son v Caledonian Railway Co* (1875) 2 R 346, at 348.
16. *Gloag and Irvine*, p 400.
17. *Bon Accord Removals v Hainsworth*, above, n 12. The case distinguished was *Peebles & Son*, above, note 15, where Lord Young had made his views plain on the matter of carriers contracting for general liens.
18. *Malcolm v Bannatyne*, 15 Nov 1814, FC (lien prevailed over general creditors in customer's bankruptcy); *Stevenson v Likly* (1824) 3 S 291 (NE 204); *Scottish Central Railway Co v Ferguson* (1864) 2 M 781 (in these cases lien good against consignee); *Mossgiel SS Co v Stewart* (1900) 16 Sh Ct Rep 289 (lien prevailed over hypothec of landlord). The rule may be different as regards indorsees of bills of lading, see below, para 221.

216. Property covered by the lien. In general, the carrier's lien extends over all the property which he is carrying upon his customer's behalf under the contract between them.¹ It was held in an English case that the lien does not permit the detention of the customer, nor the clothes he is wearing, if he is travelling as a passenger along with his property.² There would seem no doubt that the same rule applies in Scotland.³

There exists the interesting question as to whether the lien extends to property which the customer does in fact not own. In England it is the law that the lien does so extend in respect of common carriers.⁴ The rationale is the same rationale which applies to the innkeeper down south. The lien is seen as a counterpart to the public duties imposed upon the common carrier.⁵

As regards the position in Scotland, it is possible to read certain statements of Bell and Lord Young to the effect that the law is the same here as in England.⁶ In addition there is the Sheriff Court decision of *Mossgiel SS Co v Stewart*⁷ in which the sheriff takes this view expressly. There, part of the cargo which a shipping company was exercising their lien over turned out to be furniture which had been obtained on hire purchase by the shipper. The company did not know this when they accepted it for transportation. The sheriff followed English authority to hold that the lien was nonetheless effectual.⁸ He dismissed an American case in which the opposite conclusion was reached upon "the settled and universal principle"⁹ that any individual dealing with property without its owner's consent has no claim against the owner for his expenses. The rule was recognised by the sheriff to apply to pawnbrokers and purchasers. However, the difference, he pointed out with regard to common carriers, was their public duty to receive goods with "no opportunity of making inquiry as to ownership".¹⁰

The present writer prefers the American decision. To say that a common carrier has an absolute duty to receive all goods is to exaggerate. The English texts contain a number of examples of situations where he may refuse to do so.¹¹ It is surely arguable that in a case where he was suspicious as to the ownership of the property and in doubt as to whether he would be paid, he could also refrain from carrying. Further, one is not conscious of a significant body of case law relating to carriers being sued for not fulfilling their duty to carry.¹² The view consequently taken here is that the true owner should prevail. There seems to be no convincing reason why a carrier should be given a privilege which other lien-holders are not.¹³ Further, following the English rule means allowing the carrier not only to prevail over the true owner, but also over any third parties with a subordinate real right in the property.¹⁴ More generally, the notion of a lien arising out of public duty resulting in only common carriers being given a lien and not private carriers is not part of Scots

law.¹⁵

1. Bell, *Principles*, s 1424; *Gloag and Irvine*, p 400; *Lamb v Kaselack, Alsen & Co* (1882) 9 R 482.

2. *Wolf v Summers* (1811) 2 Camp 631; 170 ER 1275.

3. That the rule is the same in Scotland is accepted by Bell, *Commentaries*, II,96; *Gloag and Irvine*, p 400; D M Walker, *SME*, vol 3, para 672.

4. *Skinner v Upshaw* (1702) 2 Ld Raym 752; 93 ER 3; *Yorke v Greenhaugh* (1703) 2 Ld Raym 866 at 867 per Holt CJ; 92 ER 79 at 80; G W Paton, *Bailment in the Common Law*, (1952), p 273; Crossley Vaines, *Personal Property*, (5th ed, 1973), pp 142-143; N E Palmer, *Bailment*, (2nd ed, 1991), p 1013; *Halsbury*, vol 5(1), para 586. However, it has been held in the common law system of Australia that the lien may not be effectual if the carrier knew that the true owner gave no authority for the goods to be sent for transport : *Kilner's Ltd v The John Dawson Investment Trust Ltd* (1935) 35 SR (NSW) 274, per Jordan CJ at 278.

5. Sir William Holdsworth, *History of English Law*, vol 7, pp 511-512; G W Paton, *ibid*; *Halsbury*, vol 28, para 536.

6. Bell in his *Commentaries*, II,94 refers to the English rule in his statement that the English law upon the carrier's lien and the Roman law are combined to create the "Scottish Jurisprudence" on the matter. In *Peebles v Caledonian Railway Company* (1875) 2 R 346, Lord Young at p 348 refers to the common carrier's public duty to receive goods and to him having "a particular lien on every parcel of goods for the carriage thereof". The passage, with phrases such as "common carrier" and "particular lien" has a decidedly English law tone.

7. (1900) 16 Sh Ct Rep 289.

8. In particular Lord Holt in *Yorke v Greenhaugh*. See above note 4.

9. (1900) 16 Sh Ct Rep 289, at 298. The American decision is *Robinson v Baker* 51 American Decisions, page 54.

10. *Ibid*.

11. *Halsbury*, vol 5(1), para 442; *Palmer*, above, n 4, at pp 973-975. In particular, the common carrier may refuse to carry until paid the full and proper price of carriage : *Wyld v Pickford* (1841) 8 M & W 443; 151 ER 1113.

12. See *Halsbury*, vol 5(1), para 441, where the most recent case cited is *Belfast Ropework Co Ltd v Bushell* [1918] 1 KB 210. *Palmer*, *ibid*, at p 973, notes that the common carrier used to be liable to indictment for refusal to carry, but that this is no longer the law.

13. Other than perhaps their strict liability under the edict *nautae caupones stabularii*. For an interesting study of how the edict became applicable to carriage by land in Scotland, see an early article by the current Lord President : A F Rodger, "The Praetor's Edict and Carriage by Land in Scots Law", (1968) 3 Ir Jur (NS) 175. However, the Carriers Act 1830 (11 Geo IV & 1 Will IV c 68) (as amended) has reduced the extent of this liability. The carrier may contract out of it provided he takes reasonable care to inform his customer. Further his liability in respect of specified goods,

for example jewellery and watches, is excluded unless the customer declares their nature and value, if over £10, on handing them over. On the operation of the Act, see D M Walker, *SME*, vol 3, para 609.

14. As happened in the *Mossgiel* case (above, note 7) where the lien was held to prevail over the landlord's hypothec.

15. In England, the accepted view is that private carriers have no lien as they have no public duty to carry : see G W Paton, *Bailment in the Common Law*, (1952), pp 227-233; Crossley Vaines, *Personal Property*, (5th ed, 1973), p 143; *Halsbury*, vol 5(1), para 586. This is definitively the case as against third parties : N E Palmer, *Bailment*, (2nd ed, 1991), pp 1013-1014; *Electric Supply Stores v Gaywood* (1909) 100 LT 855. In Scotland, any carrier has a special lien arising out of their contract with their customer : W M Gloag, *Encyclopaedia*, vol 9, para 478; A J Sim, *SME*, vol 20, paras 76-77.

217. Enforcement. As regards enforcement of the lien, the view has been expressed that the right is one of detention with no automatic right to go to court and ask for a power to sell. In a case involving a railway company's lien for carriage, Sheriff Berry stated this opinion.¹ He then proceeded to examine Bell's *Principles* which refers to various situations, regarded by the sheriff as "exceptions", where a power of sale can be applied for, including where there are "goods prepared for the market, and useful only as commodities in trade."² It is submitted, however, that the Sheriff has got matters the wrong way round and that in general, a lien-holder may apply for a power to sell, apart from recognised exceptions, such as an author's unpublished compositions and items which are *per se* not marketable.³

The leading case of *Stevenson v Likly*,⁴ which Sheriff Berry refers to, coheres with the conclusion reached. There the court opined that the carrier should notify his exercise of his lien to the consignee "and in the event of not being paid, to bring [the property] to judicial sale without delay".⁵ It must be noted that Sheriff Berry also cites the opinion of Lord President Inglis in another railway case as authority for his view.⁶ However, all Lord Inglis said was that the carrier's right to retain goods was a "passive security" when compared with a pledge with an express power of sale.⁷

1. *North British Railway Co v Russell* (1895) 11 Sh Ct Rep 241, at 245-246.

2. Bell, *Principles*, s 1417.

3. See Bell, *ibid*. For example, title deeds subject to a solicitor's lien cannot be sold : *Ferguson and Stuart v Grant* (1856) 18 D 536.

4. (1824) 3 S 291.

5. *Ibid*, at 293.

6. *North British Railway Co v Carter* (1870) 8 M 998.

7. *Ibid*, at 1000.

218. Extinction. Like any other lien, the carrier's right is extinguished if he releases the goods from his custody.¹ Releasing some of the goods, however, leaves the lien intact in respect of the remaining goods for the entire sum due under the same contract of carriage.² It has been held in English sea carriage cases that the lien is waived if the contract in question provides that the freight is payable at a particular date after the landing of the goods.³ The logic seems clear enough.

1. Bell, *Commentaries*, II,97; *Gloag and Irvine*, p 402; D M Walker, *SME*, vol 3, para 629.

2. *Malcolm v Bannatyne*, 15 Nov 1814, FC.

3. *Foster v Colby* (1858) 28 LJ Ex 81; *Kirchner v Venus* (1859) 12 Moo PCC 361; 14 ER 948. See *Gloag and Irvine*, p 402. The lien will also not operate if the carrier has agreed to give credit: *Raitt v Mitchell* (1815) 4 Camp 146; 171 ER 47.

219. Carriage by air specialities. It is difficult to find any Scottish material on this subject.¹ When Gloag and Irvine's *Law of Rights in Security* was published in 1897, the world's first powered flight by the Wright brothers was still six years ahead and Bleriot's journey across the channel was not to come for a further six years beyond that. As carriage of air became more common it was felt that there was much to be gained from nations adhering to the same rules. To this end, in Warsaw in 1929, the Convention for the Unification of Certain Rules relating to International Carriage by Air was signed.² This was brought into United Kingdom law by the Carriage By Air Act 1932 and subsequent legislation.³ The Warsaw Convention, however, is silent on the issue of the carrier's lien.⁴

In England, it appears to be the case that the air carrier has no lien unless he expressly provides for one when contracting with his customer.⁵ Two reasons are given for this. Firstly, the Warsaw Convention does not give him a lien. Secondly, air carriers are private rather than common carriers and private carriers in English law have no lien.⁶ As regards Scotland, it is submitted that where goods are being carried by air internally, for example from Aberdeen to Turnhouse, the air company

will have a special lien arising out of the contract of carriage.⁷ Our law of course does not deny private carriers a lien.⁸

With regard to goods carried from Scotland to England or beyond the issue becomes more complicated and international private law becomes relevant.⁹ In summary, it would seem that because of the fact that a lien is a real right, it is the law of the *situs* which will be important.¹⁰ The carriage debt will normally arise when the aeroplane lands as the goods will then have been duly carried.¹¹ Consequently, if the law of the country to which the goods are being transported automatically confers a lien on carriers, then a lien will duly arise.¹² If that country does not recognise such a right, then the carrier will have no lien. The validity of any express contractual right of retention as between carrier and customer will be subject to governance by the proper law of the contract.¹³

1. On the subject of carriage by air in general, see J A K Huntley, *SME*, vol 3, paras 736-759.

2. J Ridley, *The Law of the Carriage of Goods by Land, Sea and Air*, (5th ed, 1978, by G Whitehead), p 223.

3. Carriage By Air Act 1932 (c 36). On the later legislation, see *Huntley*, above, n 1, paras 737-739.

4. *Ridley*, p 235.

5. *Ridley*, *ibid*. The right to provide for a lien seems implicit in the Warsaw Convention : see C N Shawcross and K M Beaumont, *Air Law*, (3rd ed, 1966), pp 492-493.

6. See above, para 215.

7. The duty of the air company to hand over the goods and the duty of the customer to pay are reciprocal and the carrier is thus entitled to a lien. See, generally, Bell, *Principles*, s 1419.

8. See above, para 215.

9. International private law will be equally relevant to transportation beyond Scotland by land or sea. For an excellent account of the remedies of a sea carrier in different jurisdictions, see H Tiberg, *The Law of Demurrage*, (3rd ed, 1979), pp 617-635.

10. R D Leslie, *SME*, vol 17, paras 313-318.

11. Lien like all securities is parasitic upon a debt.

12. For example, Germany : HGB, art 440.

13. Contracts (Applicable Law) Act 1990 (c 36), implementing the Convention on the Law applicable to International Obligations (Rome, 19 June 1980), Cm 8489. See R D Leslie, *SME*, vol

17, paras 278-282 (as updated in the *SME* 1996 Cumulative Supplement); A E Anton with P R Beaumont, *Private International Law*, (2nd ed, 1990), chapter 11; G C Cheshire and P M North, *Private International Law*, (12th ed, 1992), chapter 18. Under article 5 of the Convention, consumers are entitled to the protection of the mandatory rules of their country of habitual residence when contracting. It is expressly provided, however, by article 5(4)(a) that a carriage contract is not a consumer contract for the purposes of article 5.

220. Carriage by land specialities. The majority of decisions involving the land carrier's lien concern the operation of nineteenth century railway legislation.¹ In the first place, under s 90 of the Railway Clauses Consolidation (Scotland) Act 1845 railway companies were given the right to detain and sell goods and carriages for arrears of "tolls due by the owner of the same, in respect of any carriage of goods".² Lord President Inglis described this as "a very important privilege"³, noting that a lien normally amounted to a mere right to detain.

The statutory provision was to be construed narrowly.⁴ The right being valid for "tolls" amounted to a general right to retain. However, as the "tolls" had to be owed by the owner of the goods, the right did not amount to a general lien valid against third parties. Thus in one case A in Leith sold flour to B in Dundee, to be forwarded to Dundee at A's expense. The railway company sought to detain the flour in terms of s 90 of the 1845 Act for unpaid tolls for the carriage of other goods due by A. It was held that B became owner of the flour on delivery to the railway company as carriers and that consequently they could not retain it under s 90.⁵ It was also held in a later case that the statutory right applied only in respect of charges for the use of lines where the goods were being transported by individuals using their own carriages and not in respect of charges for goods carried by the railway company as common carriers.⁶

The other notable statutory provision is s 7 of the Railway and Canal Traffic Act 1854.⁷ This statute has now been repealed.⁷ Nevertheless, a brief analysis is merited on policy grounds. The provision makes conditions in contracts of carriage with railway companies unenforceable if they are not "just or reasonable".⁸ In two cases clauses giving companies a general lien in respect of goods carried by them were held to be invalid in terms of s 7.⁹ The policy here again is to avoid sanctioning general liens in favour of carriers which would prejudice third parties.

Leaving s 7 aside, serious doubts have been expressed as to whether railway companies as common carriers would be allowed to create general liens, because of their duty to receive all goods brought to them by the public.¹⁰ However, the General Conditions of Carriage of Goods of the British Railways Board did provide for such a lien, fortified with a power of sale.¹¹ The lien was stated to be without prejudice to the right of stoppage in transit of an unpaid seller, which accorded with an important English House of Lords decision from the beginning of this century.¹² Given the prevailing policy on this issue, it may be doubted in Scotland whether the BRB condition was enforceable against third parties. The matter is now academic, as the British Railways Board no longer exists.¹³

1. The amount of case law on the lien of the land carrier this century is negligible, but see *Bon Accord Removals v Hainsworth* 1993 GWD 28-1785.

2. Railway Clauses Consolidation Act 1845 (8 & 9 Vict c 33) s 90. Applied by the Transport Act 1962 (c 46), s 32; Sch 3, Part IV.

3. *North British Railway Co v Carter* (1870) 8 M 998, at 1000.

4. See Lord President Inglis, *ibid*.

5. *Denholm v North British Railway Co* (1867) 1 Guth Sh Cas 120.

6. *Highland Railway Co v Jackson* (1876) 3 R 850, overruling *Caledonian Railway Co v Guild* (1873) 1 R 198.

7. By the Transport Act 1962 (c 46), s 95(1), Sch 2, part I.

8. Railway and Canal Traffic Act 1854 (17 and 18 Vict c 31), s 7.

9. *Scottish Central Railway Co v Ferguson* (1861) 2 M 781; *Peebles & Son v Caledonian Railway Co* (1875) 2 R 346.

10. *Peebles and Son v Caledonian Railway Co*, *ibid*, per Lord Young at 348; *Gloag and Irvine*, p 402; A Mackenzie Stuart, *Encyclopaedia*, vol 3, para 44.

11. See D M Walker, *SME*, vol 3, para 700.

12. *United States Steel Products Co v South Western Railway Co* [1916] 1 AC 189.

13. Due to rail privatisation. It has not proved possible to find out whether the new rail companies are using such a condition of carriage.

221. Carriage by sea specialities. The special lien of the shipowner for freight, may by express contract be extended to cover dead freight, in other words damages

for the situation where a charterer in breach of his contractual obligation, fails to load a full and complete cargo.¹ It has been accepted in England that the lien may also be extended in order to secure demurrage or port charges.² In Scotland, it is settled that a shipowner has a separate lien for general average.³ As regards a general lien created expressly, the prevailing view is clearly that such a provision would not be enforceable against third parties.⁴

It is common in the transportation of goods by sea for bills of lading to be used, so that ownership of the property may pass by symbolical delivery.⁵ The rule here is that the shipowner's lien is only enforceable against an indorsee of the bill of lading for the rate of freight expressed in the bill.⁶ Thus the shipowner is unable to detain the goods from an indorsee in respect of a general balance owed by the shipper.⁷

It is what is specified in the bill of lading which is crucial. In one English case,⁸ the rate of freight was fixed in a charter party, but only a nominal rate was referred to in the bill. It was held that the shipowner could not retain against the indorsee for the amount in the charter party. Where, however, no rate of freight is given on the bill but reference is made to the charter party, the shipowner has a lien for the amount in the charter party.⁹ In a modern case,¹⁰ the bill of lading was in a "short" form and stated that it incorporated conditions as to lien in a "long" form of bill "on file with the Federal Maritime Commission". It transpired that the relevant document was not filed with the Commission and accordingly the shipowner did not have the lien which it purported to give him.

The shipowner may retain the property carried for the entire freight specified in the bill of lading, even where the shipper has already paid some of it to the charterer.¹¹

Like all other liens the shipowner's depends on him having custody of the goods.¹² Where the ship has been hired out to another party on time - the formal name for this contract is *locatio navis* - the captain and the crew become the employees of the charterer.¹³ In this situation, the shipowner has no custody and no lien.¹⁴ Where shipowners release the cargo in return for a bond for the sum they are demanding from the shippers, the terms of the bond must be closely examined.¹⁵ Hence where a bond provided that, firstly, the lien had been released but that, secondly, the right of

the shipper to challenge its validity had been preserved, it was unsurprisingly held that the first provision rendered the second meaningless.¹⁶

Under the Merchant Shipping Act 1894, the shipowner may at any British port discharge the cargo into a warehouse and preserve his lien by giving notice to the warehouseman.¹⁷ The notice must be given at the date fixed for landing the goods, or if no date is fixed, on the passing of seventy two hours, excluding Sundays and public holidays, after the report of the ship.¹⁸ If the expiry of ninety days from the date the goods are warehoused, or earlier if the goods are perishable, the freight has still not been paid, the shipowner may authorise the warehouseman to sell part or all of the goods by public auction.¹⁹ The money raised by the sale, after being used to discharge all exigible duties, the sale expenses and the warehouse bill, is to be used to pay the shipowner.²⁰ Any residue must be paid to the owner of the goods.²¹

1. *McLean & Hope v Fleming* (1871) 9 M (HL) 38; *Lamb v Kaselack, Alsen & Co* (1882) 9 R 482; C Mackenzie, *SME*, vol 21, para 660.

2. *Gloag and Irvine*, p 400. See also T E Scrutton, *Charterparties and Bills of Lading*, (19th ed, 1984), pp 391-392; H Tibergh, *The Law of Demurrage*, (3rd ed, 1979), p 611.

3. Bell, *Commentaries*, II,95 and 99; Bell, *Principles*, s 1426; *Gloag and Irvine*, p 400; W G Normand and J G McIntyre, *Encyclopaedia*, vol 3, para 84; D M Walker, *Principles of Scottish Private Law*, (4th ed, 1989), vol III, p 401.

4. Sheriff Guthrie in Bell, *Principles*, s 1424; *Gloag and Irvine*, *ibid*.

5. On symbolical delivery, see W M Gordon, *SME*, vol 18, para 621.

6. Bell, *Commentaries*, II,96; Sheriff Guthrie in Bell, *Principles*, s 1424; *Gloag and Irvine*, p 401; Scrutton, pp 388-389; Tibergh, pp 624-625.

7. *Bogle & Co v Dunmore* (1787) Mor 14216.

8. *Foster v Colby* (1858) 28 LJ Ex 81.

9. *Smith v Sieveking* (1855) 5 El & Bl 589; 119 ER 600; 24 LJ QB 257.

10. *Georgia Pacific Corporation v Evalend Shipping Co SA* 1988 SLT 683 (OH).

11. *Youle v Cochrane* (1868) 6 M 427.

12. Bell, *Principles*, s 1424; *Gloag and Irvine*, pp 400-401; C Mackenzie, *SME*, vol 21, para 665. See too the recent English case of *China Pacific SA v Food Corporation of India* [1982] AC 939.

13. *Gloag and Irvine*, *ibid*.

14. Bell, *Commentaries*, II,94-95; Bell, *Principles*, above; Gloag and Irvine, *ibid*. See the English case of *Hutton v Bragg* (1816) 7 Taunt 14; 129 ER 6.

15. W A Wilson, *The Law of Scotland on Debt*, (2nd ed, 1991), para 7.7.

16. *Georgia Pacific Corporation v Evalend Shipping Co SA* 1988 SLT 683.

17. Merchant Shipping Act 1894 (c 60), ss 493-494. For an annotated copy of the relevant provisions of the Act, see T E Scrutton, *Charterparties and Bills of Lading*, (19th ed, 1984), pp 476-479. See also, *Tiberg*, above, n 2, p 629.

18. 1894 Act, s 493.

19. 1894 Act, s 497.

20. 1894 Act, s 498.

21. 1894 Act, s 498.

12. HOTELIER'S LIEN

222. General. In this section will be considered the right of the owner of a hotel to retain property brought to it by his guests until their bills are paid. A similar right is recognised in many jurisdictions.¹

In Scotland the traditional terminology used has been that of the "innkeeper's lien".² However, "innkeeper" is a term with a somewhat archaic flavour, conjuring up for him the image of Mary and Joseph being offered room in a stable.³ Likewise, "inn" has connotations of the opening scene from *Treasure Island* or the places where Sherlock Holmes stayed whilst investigating cases.⁴ It seems time that the terminology was updated.⁵ Consequently this paper, other than in a historical context, will refer to the right in question as the "hotelier's lien".

1. See, for example, the French Civil Code, art 2102(5); the BGB, art 704; the Hotel Proprietors Act 1963 (c 7), s 8(2) (Eire); the Italian Civil Code, art 2760; the Civil Code of Louisiana, art 3217(8) and the Civil Code of Quebec, art 2302. Note too the American Law Institute, *Restatement of the Law of Security*, (1941), ss 61(c) and 63.

2. Bell, *Commentaries*, II,99-100; Bell, *Principles*, s 1428; Gloag and Irvine, pp 397-400; D M Walker, *Principles of Scottish Private Law*, (4th ed, 1989), vol III, p 401; A J Sim, *SME*, vol 20, paras 90-93; W M Gloag and R C Henderson, *The Law of Scotland*, (10th ed, 1995), para 19.28.

3. Luke 2:7.

4. R L Stevenson, *Treasure Island*, (1882); Sir Arthur Conan Doyle, *Sherlock Holmes : The Complete Illustrated Short Stories*, (1985).

5. In the Hotels and Tourism section of the *SME*, J J Downes attempts to update matters by referring to the right as the "hotelkeeper's lien" : vol 11, para 1757. This terminology was also used by the Sheriff-Substitute in *Ferguson v Peterkin* 1953 SLT (Sh Ct) 91.

223. Background. The first Scottish writer to refer to what then could accurately be referred to as the right of retention of an innkeeper was Bankton in his *Institute*. The reference does not come within his discussion of Scots law, but rather at two different points within his "Observations on the Laws of England". One of these is found, as might be expected, in his discourse on the rights of retention recognised by English law.¹ The other falls within his discussion of the strict liability of English innkeepers and ship masters for goods damaged within their inns and ships.² This liability derives from the Roman edict, *nautae, caupones, stabularii*. Bankton writes here :

"For the security and protection of travellers, inns are allowed certain privileges : thus, the horse and goods of a guest . . . may be detained by the inn-keeper, as likewise the guest himself, until the reckoning is paid, and that even against the owner, where it was a stolen horse."³

With a couple of caveats, this may be accepted as a correct statement of English law from the fifteenth century to the present.⁴ The innkeeper or hotelier has the duty to receive guests and the duty to ensure the safety of any goods which they bring into his property. As a counterpart to these duties he has the right to detain the goods (if there are any) until the guests' bills are paid. Further, as his duty to look after his guests' goods applies to all goods which they bring across his threshold, irrespective of who owns them, his right to retain likewise applies to all these goods. Thus, as Bankton says, the innkeeper may retain a stolen horse from its owner until the account of the person who brought it to the hotel is discharged.⁵ This feature marks the lien out from others recognised by English law. It arises very much from the fact that the lien is seen as a counterpart to the public duties of the innkeeper, rather than something arising out of the agreement between him and his guest.⁶ To put it another way, the right to retain is viewed as resting upon custom rather than, as is usual with liens, contract.

What becomes interesting now is Bankton's discussion of Scots law. He does not mention a right to retain in favour of an innkeeper when treating retention.⁷ Moreover, he does not recognise any such right in his detailed discourse upon the reception of the edict *nautae, caupones, stabularii* into Scots law.⁸ The conclusion would seem very clear. Scots common law does not give a right of retention to an innkeeper as a counterpart to his obligation to look after the property of his guests. The Roman edict was received differently into the laws of Scotland and England.⁹

As has been previously shown, English law as it developed conferred liens upon distinct professions.¹⁰ The original individuals to be granted the right were those holding a position which entailed certain duties. Thus, the right was granted to innkeepers who were bound to receive guests and look after their property and to common carriers who were bound to carry goods.¹¹ In Scots law, lien developed totally differently, out of the all-embracing defence mechanism of retention recognised by the civil law. Therefore, the Scottish innkeeper never had a lien based upon his public duties. Any lien he had, it being admitted that there appears to be no pre-1800 authority, could only arise out of the contract which he made with his guest.

1. Bankton, "Observations on the Law of England", I.17.10.

2. Bankton, "Observations on the Law of England", I.16.

3. *Ibid.*, at I.16.10.

4. The caveats are : (1) the right seems as much for the security and protection of the innkeeper as for travellers; and (2) it is now clear that an innkeeper may not detain his guest for any reason : *Sunbolf v Alford* (1838) 3 M & W 248; 150 ER 1135. For modern accounts of the law, see G W Paton, *Bailment in the Common Law*, (1952), pp 217-224; *Halsbury*, vol 28, para 536; *A P Bell*, p 140.

5. Bankton cites Bacon's *Abridgement* as his authority. See now, *Paton*, at pp 219-221 and *Robins & Co v Gray* [1885] 2 QB 501.

6. See Sir William Holdsworth, *History of English Law*, vol 7, pp 511-512; *A P Bell*, pp 138-140.

7. Bankton, I.17.15-18.

8. Bankton, I.16.

9. The point being strongly illustrated that livery stable keepers have strict liability derived from the edict in Scots law, but not English law : see *Mustard v Paterson* 1923 SC 142 and below, para 11.

10. See above, paras 131-132.

11. *Ibid.*

224. The role of Bell. The first Scottish authority to make reference to the lien of an innkeeper is the third edition of Bell's *Commentaries*, published in 1819.¹ The previous editions are silent upon the matter. Bell treats the lien as an example of one of the special liens recognised by Scots law.² Bar the final sentence, his account is an undiluted statement of English law, backed up by English authority.³ Indeed it begins with the words "In England . . .".⁴ What follows in summary is a passage stating that an innkeeper has a lien upon his guest's luggage for his bill and upon his horse for its stabling and keep. Bell notes that if a horse is brought to the inn which turns out to be stolen, the innkeeper's lien operates nonetheless.⁵ He states that in England the keeper of a livery stable has no lien, because he has no public duty to receive horses. Finally, he offers his opinion on how Scots law would operate here :

"In Scotland, it would seem that lien would be given on the broad principle that it is the resulting security for the *actio contraria* in all cases."⁶

The whole passage is repeated very similarly in the fourth and subsequent editions of the *Commentaries*.⁷ However, in these later works it is prefixed with a statement outlining the public duties of an innkeeper to receive travellers and be responsible for the safety of their luggage. This too is backed up by English authority.⁸ The way in which Bell has positioned this additional passage makes it clear that he sees the lien arising as a counterpart to the innkeeper's public duties. This much has been pointed out from the bench.⁹

The relevant passage in Bell's *Principles* treats the lien purely and simply in terms of English rules, justified by English cases.¹⁰ Further, the editor of the later editions, Sheriff Guthrie, remains true to Bell's treatment, by adding further English principles set out in later English cases.¹¹

1. The first case to deal with the matter was still thirty years in the future : *McKichen v Muir* (1849) J Shaw 223.

2. Bell, *Commentaries*, (3rd ed, 1819), II,147.

3. The authorities cited are Whitaker on *Lien: Jones v Pearle* 1 Stra 556; 93 ER 689 and *Hunter v Barkley* (1792) 2 Espinasse, NP 283.

5. The rule is a general one, applying not just to horses : *Robins & Co v Gray* [1895] 2 QB 501.

6. Bell, *op cit* n 2.

7. Bell, *Commentaries*, (4th ed. 1821), II,109-110; (5th ed. 1826), II,103-104 and in the 7th ed. (1870), at II,99-100. One point of difference is that in the 3rd and 4th editions it is stated that there is a right to detain the guest himself. This does not appear in later editions. See below, para 7.

8. The case of *Thompson v Lacy* (1820) 3 B and Ald 283; 106 ER 667.

9. *Skirving v Skirving* (1869) 1 Guth Sh Cas 508, at p 509 per Sheriff Shand (later Lord Shand).

10. Bell, *Principles*, s 1428.

11. *Ibid.* For example, Guthrie cites *Mulliner v Florence* (1878) 3 QBD 484 to justify the proposition that in one sense the lien is general because it extends "over all the guest's property".

225. Later authorities. The authorities subsequent to Bell generally view the hotelier's lien from the standpoint of English principle. Gloag and Irvine writing in 1897 state :

"[The lien] is held to be allowed as a counterpart of the obligation of the innkeeper to receive the guest and his luggage, and of his liability should that luggage be stolen."¹

Their authority is the important English case of 1895, *Robins v Gray*,² in which the Court of Appeal extensively examined the basis of the lien in England. Writing some years later, Gloag makes the same point in another way, by stating that the lien is an "exceptional" one, resting "rather on custom of trade than on any implied contract."³ A more modern writer, Sim, reverts to the older formulation, by stating that the lien is the "counter-balance" to the obligation of the hotelier to receive guests and their luggage.⁴

Similar expressions have been made in the case law.⁵ Lord President Emslie, in the only Court of Session case which saw an examination of the basis of the lien, noted that the views expressed in Bell's *Principles*, as edited by Guthrie, and Gloag and Irvine had not been challenged since their publication "upwards of 80 years" ago.⁶ He stated :

"Now the lien which the law of Scotland allows to an innkeeper is intended to be the counterpart of the obligations and strict liability of his calling".⁷

What is the "strict liability" to which Lord Emslie is referring ? As discussed in an earlier part of his judgement, it is the liability which originated in the Roman edict *nautae, caupones, stabularii*. Lord Emslie refers to Bankton, Erskine and the Scottish cases which discuss the reception of that edict into Scots law.⁸ He then says this of the innkeeper/hotelier :

"His liability is of the strictest. It may only be avoided if loss or damage is attributable to an act of God, or the king's enemies, or the negligence of the guest himself. This is trite law. All that I have said so far finds echo in the law of England and I need do no more than to refer to the case of *Robins v Gray*".⁹

1. *Gloag and Irvine*, p 397.

2. [1895] 2 QB 591.

3. W M Gloag, *Encyclopaedia*, vol 9, para 481.

4. A J Sim, *SME*, vol 20, para 90.

5. *Skirving v Skirving* (1869) 1 Guth Sh Cas 508; *Macbeth v Hutton* (1892) 8 Sh Ct Rep 25; *Lorrain v Fulton* (1903) 19 Sh Ct Rep 283; *Gilhooly v Gilrain* (1911) 27 Sh Ct Rep 164.

6. *Bermans and Nathans Ltd v Weibye* 1983 SLT 299, at 302. The statement is similar to that of Sheriff Henderson in *Lorrain v Fulton* (1903) 19 Sh Ct Rep 283 who noted that "Professor Bell's view . . . has never been called into question". Lord Emslie cites the statement of Lord Ormisdale in *Rothfield v North British Railway Co* (1920) 2 SLT 269, at 282 in his support : "There is little, if any difference, between the views taken in the Courts of [Scotland and England] as to the rights and obligations of the keeper of an inn."

7. *Bermans and Nathans Ltd v Weibye* 1983 SLT 299, at 302.

8. *Bankton*, I.16.1-2; *Erskine*, III.1.28; *Mustard v Paterson* 1923 SLT 21; *Rothfield v North British Railway Co* 1920 2 SLT 269.

9. *Op cit*, n 7.

226. The basis of the lien explored. Given the authorities examined it can be seen that the accepted view of Scots law is that the hotelier's lien is the counterpart of his duty to receive guests and his strict liability in respect of their goods derived from

Roman law. It follows that the lien cannot be regarded as based upon the contract between hotelier and guest. This conclusion, perhaps unsurprisingly, causes Professor McBryde some problems. He sees no reason why the hotelier should not have a lien arising out of the mutuality principle of the law of contract.¹ In other words, because there is an agreement between hotelier and guest, the hotelier may have a lien over the guest's property if does not fulfil his obligation under that agreement to pay his bill. For reasons which will be set out, it is felt that Professor McBryde's view is justified.

The fact of the matter is that the hotelier's lien recognised by today's Scots law is based upon English authority. Much of the responsibility for this state of affairs lies with Bell. At the time when he wrote there was no previous Scottish authority on the subject.² Instead of trying to develop the law in terms of the general principles of retention recognised by the civil law, he, as we saw above, dealt with the matter more or less entirely by adopting English rules.³ All later Scottish authorities except Professor McBryde have accepted Bell's treatment, seeing Scots and English law as the same here.⁴

To take this view is surely to be misguided, for as our examination of Bankton showed the laws in the two countries, before Scots law was influenced by Bell, were distinct.⁵ The edict *nautae, caupones, stabularii*, contrary to Lord Emslie's expressed view, was received differently north and south of the border. The liability imposed was similar. In England, however, the innkeeper as early as the 15th century, in return for bearing that liability as well as the duty to receive guests, was given a lien over their luggage.⁶ The same thing did not happen in Scotland. If it had, Bankton would have told us about it. As for why this was the case, the answer seems clear. In civilian Scotland, retention exists as a generally available defence.⁷ It is as open to innkeepers as much as to any other party holding another's property where that other is in debt to him. In England, no such general doctrine was or is recognised.⁸ The law merely conferred specific liens in specific situations. This was one such situation, where the law felt it had to compensate innkeepers for the onerous obligations it had imposed upon them. The law of Scotland here was clear, that is until Bell published the third edition of his *Commentaries* and the rest, as may be said, is history.

This all leaves us in a rather difficult situation. We have the choice of either leaving the law in its post-Bell anglicised state or instead of reverting to its civilian roots. The latter choice means recognising the hotelier's lien as arising out of his contract with his guests, an option which coheres with the approach of Professor McBryde. It is proposed to examine the operation of the hotelier's lien in depth, before drawing any conclusion.

1. W W McBryde, *Contract*, (1987), p 316.

2. Which probably explains why he waited until the 3rd edition of his *Commentaries* before examining the subject.

3. See above, para 224.

4. See the preceding paragraph.

5. See above, para 223.

6. *Ibid.*

7. *Stair*, I.18.7; *Bankton*, I.24.34; *Erskine*, III.4.20.

8. Sir William Holdsworth, *History of English Law*, vol 7, pp 511-512; *A P Bell*, pp 138-141; A H Silvertown, *Law of Lien*, (1988).

227. Special lien or general lien ? There has existed some confusion over the years as regards the matter of how the hotelier's lien should be viewed. Gloag and Irvine opine that it "presents special features which make it difficult to classify it as a special or as a general lien".¹ This is not very helpful, as we are not told what the special features are. Sim echoes the statement.² He adds that the hotelier's right is "more akin"³ to a special lien. At face value this is fine. However, the reader is left perplexed because Sim treats the hotelier's lien in his section on general liens.⁴ Gloag and Henderson perform a somewhat similar feat, treating the lien in their section on general liens, but stating that it is a special lien.⁵ Graham Stewart and Professor Walker, on the other hand are quite clear, that the lien is a special one.⁶

The present writer takes the view that the matter is a straightforward one. The lien is special. It secures the debt which arises out of the contract between hotelier and guest whereby the latter is given accommodation for a price. Now certainly the debt may be composed of a large number of individual charges, for example the bill for

the mini bar; the cost of dinner; the price of the daily newspaper delivered; and so forth. However, all these charges are leviable in terms of the original contract. If the lien was general a guest arriving at his hotel in 1996 could have his luggage detained for the debt outstanding from his visit in 1993. No where is such a proposition suggested. Rather, it is universally rejected.⁷

The view that the hotelier's lien is nothing other than special is supported by the case of *Ferguson v Peterkin*.⁸ There, a wardrobe door in the bedroom of two guests had fallen off, breaking the mirror on it. The hoteliers refused to accept payment of the guests' bill for board, without payment for the door. They detained the guests' luggage for 48 days in security of the bill. The matter came to court, where the Sheriff-Substitute held that the hotelier's lien is a special lien, merely securing payment for board and entertainment.⁹ Consequently, it cannot secure a claim for damages in respect of a broken door.¹⁰

It is suggested that the person responsible for today's unnecessary confusion is Sheriff Guthrie, the editor of the later editions of Bell's *Principles*. In a passage which first appeared in the 8th edition in 1885, he accepts that the lien is not general because it does not revive on a guest returning to the hotel at a later date.¹¹ Nevertheless, he adds that "in another sense" the lien is general because it extends to all the guest's property brought to the hotel, as well as to his horses and carriages, for the guest's own expenses. The idea seems to be that there are two contracts - one for accommodating the guest and one for accommodating his horse and carriage - and further that the latter property may be detained till the debt due under the former contract is satisfied.

Sheriff Guthrie's idea comes from the English case of *Mulliner v Florence*,¹² where an innkeeper claimed a lien on horses brought to his inn. The guest claimed that the lien did not cover the cost of his own board, but only that of the horses. The court had none of it, holding that the lien was general applying to all the guest's property for his entire debt owed to the innkeeper. This is all very well, but to try and isolate two separate contracts between hotelier and guest is to defy economic reality. The hotelier receives the guest's luggage and his means of transport in terms of a single agreement for the guest to be provided with accommodation. To describe the lien as

general is to use the term "general lien" in a distinct and not the usual sense. Indeed, it might be said that it is using the term in a special and not its general sense.

Today, it is not possible to entertain the notion that the lien is general even in the sense the court in *Mulliner v Florence* viewed it to be. For, in terms of the Hotel Proprietors Act 1956, the lien does not attach to "any vehicle or any property left therein, or any horse or other live animal or its harness or other equipment".¹³ Thus the guest's means of transport cannot be detained. The lien applies only to the rest of the guest's inanimate property. It is undoubtedly a special lien, a view shared by none other than Bell himself.¹⁴

1. *Gloag and Irvine*, p 397.

2. A J Sim, *SME*, vol 20, para 90.

3. *Ibid*.

4. A J Sim, *SME*, vol 20, paras 78-100.

5. W M Gloag and R C Henderson, *The Law of Scotland*, (10th ed, 1995), para 19.28, fn 55.

6. J Graham Stewart, *Law of Diligence*, (1897), p 173; D M Walker, *Civil Remedies*, (1974), p 68; and *Principles of Scottish Private Law*, (4th ed, 1989), vol III, p 401.

7. Sheriff Guthrie in Bell, *Principles*, (8th ed onwards), s 1428; Gloag and Irvine, p 399; A J Sim, *SME* vol 20, para 92; *Harp v Minto* (1870) 1 Guth Sh Cas 508; the English case of *Jones v Thurlowe* (1723) 8 Mod Rep 172.

8. 1953 SLT (Sh Ct) 91.

9. He relied on Bell, *Principles*, ss 1411, 1419 and 1428 and Graham Stewart, above n 6.

10. The hoteliers were held liable in damages for wrongful detention. See, below, para 233.

11. Bell, *Principles*, s 1428.

12. (1875) 3 QBD 484.

13. Hotel Proprietors Act 1956 (c 62) s 2(2).

14. In both his *Commentaries*, II,99-100 and his *Principles*, s 1428, he treats the right as a straightforward case of special lien.

228. Property covered by the lien. The lien, subject to a statutory exception, attaches to all goods brought by the guest into the hotel.¹ That exception, which was

set out in the previous paragraph, is in respect of any vehicle brought by the guest, any property left in it, or any horse or other live animal or its harness or other equipment.² Thus bicycles are no longer subject to the lien.³ In Quebec, the guest's personal documents and effects of no market value may not be detained.⁴

Leaving the vehicle exception aside, the lien extends over the guest's luggage no matter what sort of property it is. The cases contain a number of examples : a box of clothes and a pipe;⁵ a piano;⁶ the professional instruments and materials of a dentist;⁷ a portmanteau;⁸ and a gun.⁹

The hotelier may not detain the guest himself or the clothing he is wearing.¹⁰ This would amount to private imprisonment. An attempt to widen the rule was made in the case of *McKichen v Muir*.¹¹ There the Muir family had booked into an inn in order to attend a local ball. On returning from the event Mr Muir disagreed with the innkeeper over the bill. The latter consequently detained the family's ordinary clothes. This meant that the family had to walk eight or nine miles home on a rainy night, with the ladies wearing only "thin shoes and light muslin dresses, and without bonnets".¹² In a subsequent petition, Mr Muir argued that as the journey was the family's only alternative to being "detained" at the inn, the right claimed by the innkeeper was "equivalent to a power of incarceration".¹³ The Circuit Court of Justiciary rejected the submission. Thus it would seem that the general rule will be construed narrowly.

The lien only attaches to the guest's personal luggage. It does not cover goods sent to him by a third party for his use during a stay.¹⁴ Thus where theatrical costumes were sent to a hotel for the use of a film crew who were staying there, these were found not to be subject to the hotelier's lien.¹⁵ In an English case, the same was found in respect of a piano hired by the guest whilst he was at an inn.¹⁶

Gloag and Irvine discuss the matter of whether the lien attaches to the property of an individual who comes into the hotel only for refreshment and not to stay.¹⁷ On the basis that the hotelier is equally responsible for the safety of their property as for that of a boarder, they conclude that it is "probable" the lien will apply. The logic is difficult to doubt.

1. Bell, *Principles*, s 1428; *Gloag and Irvine*, pp 397-398; J J Downes, *SME* vol 11, para 1757; W M Gloag and R C Henderson, *The Law of Scotland*, (10th ed. 1995), para 19.28..

2. Hotel Proprietors Act 1956 (c 62), s 2(2).

3. Cf *Kingston and Co v Blair* (1896) 12 Sh Ct Rep 20.

4. Civil Code of Quebec, art 2302.

5. *Gilhooly v Gilrain* (1911) 27 Sh Ct Rep 164 (lodging house case).

6. *Macbeth v Hutton* (1892) 8 Sh Ct Rep 25 (lodging house case).

7. *Skirving v Skirving* (1869) 1 Guth Sh Cas 508 (lodging house case).

8. *Gray v Hart* (1885) 1 Sh Ct Rep 269 (lodging house case).

9. *Garden v Shaw* (1874) 1 Guth Sh Cas 505.

10. *Gloag and Irvine*, p 397; A J Sim, *SME* vol 20, para 91; W M Gloag and R C Henderson, *The Law of Scotland*, (10th ed, 1995), para 19.28. These works cite the English case of *Sunbolf v Alford* (1838) 3 M & W 248; 150 ER 1135. There existed previous authority in England for the proposition that the guest could be detained : *Newton v Trigg* (1691) Shower 268; 89 ER 566; (see also *Bankton*, "Observations on the Law of England", I.16.10). However, this authority was dismissed in *Sunbolf* where it was also held that allowing the lien to attach to the clothes a guest was wearing would mean permitting the innkeeper to assault him in order to get them. Baron Parke was particularly concerned that this meant that an innkeeper could strip his female guests naked if they did not pay their bills. See generally, G W Paton, *Bailment in the Common Law*, (1952), pp 221-222 and also the American Law Institute, *Restatement of the Law of Security*, (1941), s 63(1).

In Scotland, Bell stated that there existed the right to detain the guest in the 3rd edition (1819) of his *Commentaries*, at II,147. In the 4th edition (1821) at II,109-110, he says the same thing but notes that this is "an awkward remedy". These statements do not appear in the 5th edition (1826) or either of the subsequent editions.

11. (1849) J Shaw 223. Discussed by Professor McBryde, in his *Contract*, (1987), at pp 316-317.

12. *Ibid*, at 224.

13. *Ibid*.

14. Sheriff Guthrie in Bell, *Principles*, s 1428; *Gloag and Irvine*, p 398; A J Sim, *SME* vol 20, para 91.

15. *Bermans and Nathans Ltd v Weibye* 1983 SLT 299.

16. *Broadwood v Granara* (1854) 10 Exch 417. It might be thought that property hired by the guest would not be subject to the lien because it is not his property. However, the orthodox view is that this is irrelevant. See the next paragraph.

17. *Gloag and Irvine*, p 399.

229. Property belonging to a third party. The hotelier's lien has been stated to cover luggage which does not actually belong to the guest.¹ In this way it sharply differs from all other liens recognised in Scots law where the lien will be only effective in terms of property owned by the debtor.² The reasoning behind this was set out by Lord Emslie :

"In the case of an innkeeper . . . a lien which cannot be exercised over any of a traveller's possessions which are not his own property can scarcely be described as a counterpart of the special obligations and liability which the law requires the innkeeper to accept. . . In the very nature of things travellers have been arriving at inns for centuries with many articles in their baggage which are not their own . . . and the absence of any reported case on the question we are considering now simply suggests to my mind that no one in Scotland until now has thought it worthwhile to contend that the scope of the innkeeper's lien does not extend to all of the relevant possessions of the defaulting guest but only to those in which he has right of property."³

Thus the reason why the lien attaches to the property of third parties is because it is viewed as the counterpart of the hotelier's obligation to receive guests and ensure the safety of their luggage. In other words, this unique feature of the lien comes directly from its conceptual foundation in English law, and in terms of Bell and the orthodoxy he engendered, Scots law also.⁴

As regards the hotelier's state of mind, it may be noted that in the Irish Republic, the lien only extends to property which the guest does not own if the hotelier "was unaware" of the true position when he received the property into the hotel.⁵ The law is to the same effect in some civilian jurisdictions, including France,⁶ and Italy.⁷ The explanation for this would seem to have more to do with these systems looking upon good faith more favourably than our own, rather than a piece of law unique to the hotelier's lien. In contrast, under the law of England and probably Scotland, such knowledge is irrelevant.⁸

1. Bell, *Commentaries*, II.99; Bell, *Principles*, s 1428; *Gloag and Irvine*, p 398; D M Walker, *Civil Remedies*, (1974), p 68; A J Sim, *SME*, vol 20, para 91; J J Downes, *SME*, vol 11, para 1757; W M Gloag and R C Henderson, *The Law of Scotland*, (10th ed, 1995), para 19.28; *Bermans and Nathans Ltd v Weibye* 1983 SLT 299.

2. *Gloag and Irvine*, p 349; *Mitchell v Heys & Sons* (1894) 21 R 600; *Lamonby v Foulds Ltd* 1928 SC 89.

3. *Bermans and Nathans Ltd v Weibye* 1983 SLT 299, 302.

4. See above, paras 224-226.

5. Hotel Proprietors Act 1963 (c 7), s 8(2). See too the American Law Institute, *Restatement of the Law of Security*, (1941), s 63(2).

6. M F Planiol, *Civil Law Treatise*, vol 2, (1959), s 2521. Note too the Civil Code of Louisiana, art 3234.

7. Italian Civil Code, art 2760.

8. *Robins & Co v Gray* [1895] 2 QB 501; *Gloag and Irvine*, p 398; W M Gloag and R C Henderson, *The Law of Scotland*, (10th ed, 1995), para 19.28, citing *Bermans and Nathans Ltd v Weibye* 1983 SLT 299. However, Sheriff Guthrie in Bell's *Principles*, s 1428, which is approved by D M Walker, *Civil Remedies*, (1974), p 68, takes the view that knowledge does matter.

230. Lien or hypothec. As is well known, liens are founded on possession, or at least on custody.¹ If, however, the authorities are examined closely as to whether this is in fact true of the hotelier's lien, a rather surprising result is found. Bell's *Principles*, as edited by Guthrie, state that the lien "extends over the goods, horses, and carriages of travellers brought to the inn".² Gloag and Irvine similarly write that the lien "extends over everything which is brought to the inn by the guest".³ These statements are echoed in other authorities.⁴ Unsurprisingly, this is how the lien is stated to operate in England.⁵ Even the Irish Republic's hotelier's lien is provided by statute to extend to property "brought to the hotel by or on behalf of any guest".⁶

All seem agreed that the lien attaches to luggage which the guest brings to the hotel. However, bringing something to a hotel is not the same as putting it into the possession of the hotelier. This seems to have been recognised by Lord Justice-Clerk Alness, who said of the possession of a farmer of potatoes in his field :

"It [is] certainly superior in quality to the right of possession which an hotelkeeper has over the luggage of a guest in order to secure payment of the guest's bill."⁷

The matter is one which requires to be thought through. Now certainly, if the guest arrives at the hotel with her expensive jewels and has them placed in its safe for

security reasons, there seems no doubt that the hotel has custody. A subsequent lien over the jewels can be seen to be based on that custody. On the other hand, if as more usually happens the guest takes her luggage to her room then she cannot be said to be relinquishing custody to the hotelier. The security he has here in respect of the luggage because it has been brought to his hotel must be one of hypothec.⁸ There would seem clear parallels with the hypothec of the landlord.⁹ With a lease the tenant has possession of a certain property for a certain period. If he does not pay his rent the landlord can sequester for it.¹⁰ Similarly with a hotel stay, if the guest does not discharge his bill the hotelier may seize his luggage and detain it till he does so.

Lest it be thought that the argument advanced is without foundation, reference may be made to both our case law and German law. Throughout the Scottish decisions, there are references to the "lien" attaching to the "possessions" of the traveller.¹¹ For example, in *Garden v Shaw*, Sheriff Comrie Thomson stated that the right "extends over such effects as the [guest] may have in his possession".¹²

As regards German law, there is a well understood division between two types of security implied by law (*gesetzliche Pfandrechten*) in respect of corporeal moveables.¹³ In the first place, there are securities based on possession (*auf Grund von Besitz*). In this group are included securities in favour of carriers, storekeepers and workmen, which correspond to our liens.¹⁴ In the second place, there are securities based on the property in question being brought into the immoveable property of the creditor (*auf Grund von Einbringung*). In this group come the securities of the landlord and, importantly for our purpose, the hotelier (*der Gastwirt*).¹⁵ Consequently, the security in favour of the hotelier in German law (*das Pfandrecht des Gastwirts*) in respect of his guests' property is viewed as non-possessory (*besitzlos*).

In terms of English law, Professor Bridge has accepted that the hotelier does not have possession, "but rather the right to impede the party in possession [the guest] from exercising in full the rights that normally accompany possession."¹⁶ In other words he can detain the luggage when the guest does not pay the bill. As he says, the "personal baggage of a guest in a hotel bedroom can hardly be said to be possessed by the hotel".¹⁷ English law of course does not recognise the hypothec.¹⁸

The conclusion which may be drawn from all this is that the security the Scottish hotelier has over his guests' luggage is not one which is dependent on custody or possession. It is in fact misleading to refer to it as a lien, unless and until the hotelier actually takes hold of the property. What has almost universally been called the "innkeeper's lien" up to now should be called the "hotelier's hypothec".

1. Bell, *Commentaries*, II,86-91; *Gloag and Irvine*, pp 340-349.
2. Bell, *Principles*, s 1428.
3. *Gloag and Irvine*, p 397.
4. D M Walker, *Civil Remedies*, (1974), p 68; A J Sim, *SME*, vol 20, para 91; J J Downes, *SME*, vol 11, para 1757; D M Walker, *Principles of Scottish Private Law*, (4th ed, 1989), vol III, p 401; *Smith v Chisholm* (1893) 9 Sh Ct Rep 44 per Sheriff Birnie; Lord President Emslie in *Bermans and Nathans Ltd v Weibye* 1983 SLT 299, at 302.
5. G W Paton, *Bailment in the Common Law*, (1952), p 218; A P Bell, p 140; *Robins & Co v Gray* [1895] 2 QB 501.
6. Hotel Proprietors Act 1963 (c 7), s 8(1).
7. *Paton's Trs v Finlayson* 1923 SC 872, at 877.
8. On hypothec in Scots law, see Bell, *Commentaries*, II,25-40; Bell, *Principles*, ss 1385-1409; *Gloag and Irvine*, chapter 12; A J Sim, *SME*, vol 20, paras 101-107.
9. On which, see Bell, *Commentaries*, II,27-34; Bell, *Principles*, ss 1234 *et seq*; *Gloag and Irvine*, pp 416-436.
10. Bell, *Commentaries*, II,33-34; *Gloag and Irvine*, pp 430-436.
11. For example, *Gray v Hart* (1885) 1 Sh Ct Rep 269 (Sheriff Dove Wilson in a case involving a lodging house keeper's lien refers to the relevant property as that "which a lodger usually possesses"); *Kingston and Co v Blair* (1896) 12 Sh Ct Rep 20 (headnote refers to "bicycle in possession of one of several guests"); *Bermans and Nathans Ltd v Weibye* 1983 SLT 299 (Lord President Emslie refers to "a traveller's possessions" at 302). In contrast in *Skirving v Skirving* (1869) 1 Guth Sh Cas 508, Sheriff Shand viewed the lodging house keeper as having possession of his lodger's property.
12. *Garden v Shaw* (1874) 1 Guth Sh Cas 505, at 507.
13. See F Lent, *Sachenrecht : Ein Studienbuch*, (14th ed, by K H Schwab, 1974), p 261; F Baur, *Lehrbuch des Sachenrechts*, (13th ed, 1985), pp 540-543.
14. *Ibid*. See HGB, art 440 (*das Pfandrecht des Frachtführers*); HGB, art 421 (*das Pfandrecht des Lagerhalters*); and BGB, art 647 (*das Pfandrecht des Unternehmers beim Werkvertrag*).
15. *Op cit*, n 10. The hotelier's lien is found in the BGB at art 704.

16. M G Bridge, *Personal Property Law*, (2nd ed, 1996), p 143.

17. *Ibid*, citing Fletcher Moulton LJ in *Lord's Tr v Great Eastern Railway Co* [1908] 2 KB 54.

18. W W Buckland and A D McNair, *Roman Law and Common Law*, (1965), p 242.

231. Lodging houses. The question of whether a lodging house keeper has a lien over his lodger's property in respect of his board was one which the sheriff courts were asked to answer on a number of occasions around the turn of the century.¹ The general approach taken by the sheriffs was to look at the duties of lodging house keepers.² On the basis of two old cases and Erskine's *Institute* they recognised that those who take in lodgers are responsible for the safety of their luggage and that this liability stems from the Roman edict *nautae caupones stabularii*.³ Therefore, because like hoteliers they have this liability, then like hoteliers they are entitled to a lien as a counterpart to that liability. Gloag and Irvine are in agreement with such a conclusion.⁴

All this is very well, but most of the authorities seem to miss that a lodging house keeper will have a lien (or rather, in some cases, a hypothec) anyway on the basis of his contract with his lodger. This much was, however, recognised in Aberdeen Sheriff Court by Sheriff Dove Wilson.⁵ He noted that a lodging house keeper was different from an innkeeper in respect that he had no public duty to receive people and that his responsibility in respect of luggage was perhaps stronger. Then he said :

"But neither of these points affect the present position. Liens are allowed in many cases where there is no special responsibility for the customer's goods, and where the person who allowed it can select his customers at pleasure."⁶

The point is a good one. While it must be recognised that the lien can be based on contract, the problem comes in relation to goods which the lodger does not own. There has been no reported case on this matter. If the question was to arise, it must be conceded that the weight of authority equates the lodging house keeper's lien with that of the hotelier, and on that basis the third party owner of the goods should have a real fear of losing out.⁷ It may be noted that in Louisiana the innkeeper's lien applies to any individuals "who let lodgings or receive or take boarders".⁸

1. *Skirving v Skirving* (1869) 1 Guth Sh Cas 508; *Harp v Minto* (1870) 1 Guth Sh Cas 508; *Gray v Hart* (1885) 1 Sh Ct Rep 269; *Macbeth v Hutton* (1892) 8 Sh Ct Rep 25; *Lorrain v Fulton* (1903) 19 Sh Ct Rep 283; *Gillhooly v Gilrain* (1911) 27 Sh Ct Rep 164.

2. See for example, Sheriff (later Lord) Shand in *Skirving v Skirving*, above and Sheriff Henderson in *Lorrain v Fulton*, above.

3. *May v Wingate* (1694) Mor 9236; *Erskine*, III.1.29; *Scott v Yates* (1800) Hume 207. See also *Watling v McDowall* (1825) 4 S 83 where the court reserved its judgement on the matter. Note, however, the position of J J Downes, *SME*, vol 11, para 1742, which must be considered to be wrong. Further, note that Sheriff Guthrie Smith in *Harp v Minto* (1870) 1 Guth Sh Cas 508 followed the English case of *Holder v Soulby* (1860) 29 LJCP 246; 141 ER 1163 and held that lodging house keepers were not liable under the edict. On the liability of lodging house keepers in England, generally, see N E Palmer, *Bailment*, (2nd ed, 1991), pp 1512-1514.

4. *Gloag and Irvine*, pp 399-400. See also A J Sim, *SME*, vol 20, para 90.

5. *Gray v Hart* (1885) 1 Sh Ct Rep 269.

6. At 270.

7. But see below, para 235.

8. The lien is technically a privilege, but is dependent on the property being still in the hotel : Civil Code of Louisiana, art 3233.

232. Entitlement of other parties to the lien. Bell wrote that in England a livery stable keeper, in other words a hotelier who receives equine rather than human guests, has no lien.¹ The reason is that he has no public duty to receive the horses.² The rule remains the same down south today.³ As regards Scotland, Bell was of the opinion that such an individual would have a lien arising from the *actio contraria* in terms of his contract with the person who placed the animals with him.⁴ Lord Young expressed a similar opinion and *Gloag and Irvine* see no reason why the English rule would apply here.⁵ The present writer agrees.

The hotelier has a lien because he is a hotelier. Consequently he may not assign his right to a third party. In *Garden v Shaw*,⁶ an innkeeper retained a gun which was in the possession of one Mr Benson who had not paid his bill. Sometime later Mr Benson's agent met his debt and obtained the gun from the innkeeper. At this point Mr Garden entered the picture and went to court claiming the gun was his and that he had only lent it to Mr Benson. Mr Benson's agent argued that he could keep the item until Mr Garden paid him the amount he had paid the innkeeper. This

amounted to saying that the innkeeper's lien had been assigned to him. The Sheriff correctly had none of this, holding that :

"It would be altogether intolerable were [Mr Garden] obliged to follow his property up and down the country through the hands of a series of persons, each claiming the rights of an assignee."⁷

1. Bell, *Commentaries*, II,100; Bell, *Principles*, s 1428.

2. Further, livery stable keepers in England do not have strict liability, the edict *nautae, caupones, stabularii*, being interpreted differently there than in Scotland. See *Searle v Laverick* (1874) LR 9 QB 123 per Blackburn J at 126; *Mustard v Paterson* 1923 SC 142, per Lord Justice-Clerk Alness at 148; Lord Hunter at 150-151 and Lord Anderson at 154.

3. *Gloag and Irvine*, p 398; G W Paton, *Bailment in the Common Law*, (1952), pp 217-218; *Jackson v Cummins* (1839) 5 M & W 342; 151 ER 145; *Orchard v Rackstraw* (1850) 19 LJCP 303; 137 ER 1066; *Smith v Dearlove* (1848) 6 CB 132; 136 ER 1202. The livery stable keeper has been held not to improve the value of the animals and thus cannot claim the lien of a bailee for work done : see Paton, *ibid*.

4. Bell, *Commentaries*, II,100.

5. Lord Young in *Miller v Hutcheson and Dixon* (1881) 8 R 489, at 492; *Gloag and Irvine*, p 398.

6. (1874) 1 Guth Sh Cas 505.

7. At 507.

233. Enforcement of the lien. As with all other liens, the hotelier's lien encourages the debtor ie guest to discharge his debt by debarring him from his property until he does so. It is the guest alone who is liable for his bill. Thus where a person had assisted a guest to remove the guest's property from a hotel, that person was held not liable for the account due by the guest for board and lodging.¹ Where, however, a party of guests book into a hotel, the property of any of them may be detained in respect of the bill of the party as a whole.² The hotelier will be liable in damages if he detains luggage when he has no right to do so.³

With regard to selling the property to meet the debt, the lien is subject to its own statutory rules. As could be guessed, these rules come from England. It was held in *Mulliner v Florence* in 1875 that an English innkeeper had no right to sell articles subject to his lien.⁴ The rule was felt to be inconvenient and consequently the

Innkeepers Act 1878 was passed.⁵ It is widely accepted that the Act was never intended to apply to Scotland, where generally any lien holder can apply to the Court for a power to sell.⁶ Nevertheless, all seem now agreed that it does so apply.⁷

In terms of the 1878 Act a hotelier has the right to sell by public auction any goods, chattels, horses, carriages, wares, or merchandise deposited with him or left in the hotel premises.⁸ It is more than arguable that the Act no longer applies to horses and carriages in the light of later legislation, but other writers do not discuss the matter.⁹ The right applies where the property has been deposited or left by a person who is or who becomes indebted to the hotelier for board or lodging or the expenses of looking after any horse or other animal brought to the hotel.¹⁰ The hotelier may only exercise the right to sell in order to satisfy the debt for which he had a lien over the property.¹¹ Further, the property must have been left at the hotel for at least six weeks without the debt having been paid.¹² A minimum of one month before the sale, the hotelier must advertise it in a London newspaper and in a locally circulating newspaper, with a description of the goods and the name of the person who left them, if known.¹³ After the sale, the hotelier must pay that person on demand, after deducting the amount of the debt due to him along with the sale expenses, any surplus arising from the sale.¹³

1. *Smith v Chisholm* (1893) 9 Sh Ct Rep 44.

2. *Kingston and Co v Blair* (1896) 12 Sh Ct Rep 20. The basis of the decision was that the contract was formed between the party and the hotelier.

3. *Ferguson v Peterkin* 1953 SLT (Sh Ct) 91 (detention of luggage for damage to wardrobe door outside scope of special lien).

4. (1878) 3 QBD 484.

5. Innkeepers Act 1878 (c 38); *Gloag and Irvine*, p 399; G W Paton, *Bailment in the Common Law*, (1952), p 218; N E Palmer, *Bailment*, (2nd ed, 1991), pp 1499 and 1504-1505.

6. *Gloag and Irvine*, *ibid*; A J Sim, *SME*, vol 20, para 93. This was because of the requirement to advertise any sale under the Act in a London newspaper : 1878 Act s 1, third proviso. For the general ability of a Scots lien-holder to apply to the Court for the right to sell see Bell, *Principles*, s 1417.

7. *Gloag and Irvine*, *ibid*; A J Sim, *ibid*; D M Walker, *Principles of Scottish Private Law*, (4th ed, 1989), vol III, p 401; J J Downes, *SME*, vol 11, paras 1758-1759; W M Gloag and R C Henderson, *The Law of Scotland*, (10th ed, 1995), para 19.28; *Smith v Chisholm* (1893) 9 Sh Ct Rep 44.

8. 1878 Act, s 1.

9. That is, the Hotel Proprietors Act 1956 (c 62), s 2(2), which removes *inter alia* these things from the scope of the hotelier's lien.

10. 1878 Act, s 1.

11. *Ibid*, s 1, second proviso.

12. *Ibid*, s 1, first proviso.

13. *Ibid*, s 1, third proviso.

14. *Ibid*, s 1, first proviso.

234. Extinction of the lien. The lien is lost if the luggage of the guest is removed from the hotel. It does not revive if he subsequently returns.¹ There is an exception, however, where during a lengthy stay a guest (along with his property) is occasionally absent *animo revertendi*.² If the guest departs without paying his bill, but leaves his luggage at the hotel, it remains subject to the lien.³ It has been held in England that the lien is not lost by the hotelier accepting a security for his bill, so if that security proves to be insufficient he may then still enforce his lien.⁴

1. Sheriff Guthrie in Bell, *Principles*, s 1428; *Gloag and Irvine*, p 399; A J Sim, *SME*, vol 20, para 92, citing *Jones v Thurlowe* (1723) 8 Mod Rep 172; 88 ER 126; *Harp v Minto* (1870) 1 Guth Sh Cas 508.

2. That is, with the intention of returning. See *Guthrie*, *Gloag and Irvine*, and *Sim*, as above, all citing *Allen v Smith* (1862) 12 CBNS 638; 142 ER 1293. See also, D M Walker, *Principles of Scottish Private Law*, (4th ed, 1989), vol III, p 401.

3. Sheriff Guthrie in Bell, *Principles*, s 1428; A J Sim, *SME* vol 20, para 92, citing *Snead v Watkins* (1856) 1 CBNS 267; 140 ER 111.

4. *Angus v McLachlan* (1883) 23 Ch Div 330. On the extinction of the lien in England, generally, see N E Palmer, *Bailment*, (2nd ed, 1991), pp 1502-1504.

235. Conclusions. It has been shown that the principles upon which the hotelier's lien rests in Scotland today are English principles, brought into our law by Bell.¹ The question which remains is whether the law should be made to return to its civilian roots and recognise the lien as arising out of the contract between hotelier and guest.² It may be argued that this is a purely theoretical matter, only of interest to academics. Such an argument, however, is ill-founded. With regard to the matter of property brought to the hotel which does not belong to the guest, the foundation

of the lien is of the utmost importance. For it is only because the lien has been viewed as arising from the hotelier's public duties, that it has been allowed to prevail in respect of such property.³

The present writer is not convinced that the public duties of the hotelier are onerous enough to justify special treatment. Scots law at the time of Bankton certainly took that view.⁴ Moreover, the strict liability of the hotelier derived from the edict *nautae, caupones, stabularii* has had its stringency reduced by the Hotel Proprietors Act 1956.⁵ It may be concluded that there is little to support the perpetuation of the post Bell orthodoxy and that the hotelier's lien should be treated like any other.

The other important issue identified was the fact that the lien in many cases is truly a hypothec.⁶ The point must be stressed that the lien does live on with regard to items that the hotelier has custody of, such as that which is in his safe. Consequently, it would be inappropriate to rename this part of the thesis "The Hotelier's Hypothec". On the other hand, many of the paragraphs within it, which mention "lien" apply equally to the hypothec, for example, the sections on enforcement and extinction.⁷

1. See above, particularly para 224.

2. This approach may find some support in the judgement of Sheriff Dove Wilson in *Gray v Hart* (1885) 1 Sh Ct Rep 269 (see above, para 231) and in the views of Professor McBryde : see his *Contract*, (1987), pp 316-317. See also *Ferguson v Peterkin* 1953 SLT (Sh Ct) 91, where Sheriff-Substitute Garrett on being asked to decide what sort of lien a hotelier has said : "Whether it be based on implied obligation in a particular mutual contract and operates as a security for performance of the counterpart or depends on custom, it is a special lien".

3. *Bermans and Nathans Ltd v Weibye* 1983 SLT 299. See above, para 229.

4. See above, para 223.

5. Hotel Proprietors Act 1956 (c 62), s 2. A point not missed by Professor McBryde, *Contract*, (1987), p 316. On the operation of the Act, see J J Downes, *SME*, vol 11, paras 1748-1751 and W J Stewart, *Delict*, (2nd ed, 1993), pp 31-32.

6. See above, para 230.

7. See above, paras 233 and 234.

13. GENERAL LIEN

236. Introduction. A general lien is the right of a first party to retain property from a second party until that party discharges a balance of debt owed by him for all work performed by the first party in the same capacity in which that first party holds the property.¹ For example, a solicitor has the right to retain his client's papers until paid for all the work which he has carried out as solicitor to his client, whether the work related to those papers or not.² General liens arise only in exceptional circumstances.³ General liens also have a more restricted sphere of existence in that they are confined to contractual obligations.⁴ Nonetheless, they are regarded as much real rights as special liens.⁵

1. For alternative definitions, see Bell, *Commentaries*, II,87; Bell, *Principles*, ss 1411 and 1431; *Gloag and Irvine*, pp 340-341 and 353; W M Gloag, *Encyclopaedia*, vol 9, paras 476 and 482; W M Gloag and R C Henderson, *The Law of Scotland*, (10th ed, 1995), para 19.20; A J Sim, *SME*, vol 20, paras 75 and 78.

2. See below, paras 265-271; Bell, *Commentaries*, II,107; Bell, *Principles*, ss 1437-1438; *Gloag and Irvine*, p 384; *Macrae v Leith* 1913 SC 901.

3. *Gloag and Irvine*, p 353; *Shaw*, p 58; W M Gloag, *Contract*, p 634; J J Gow, *The Mercantile and Industrial Law of Scotland*, (1964), p 293; D M Walker, *Civil Remedies*, (1974), p 69; A J Sim, *SME*, vol 20, para 75.

4. Unlike special liens, they are not part of the general law of obligations. See above, paras 168-171 and below, para 239.

5. Bell, *Commentaries*, II,87; *Gloag and Irvine*, p 8; *Scottish Central Railway Co v Ferguson* (1864) 2 M 781; *Peebles & Son v Caledonian Railway Co* (1875) 2 R 346; *Morris v Whyte & Mackay* (1889) 5 Sh Ct Rep 163.

237. The meaning of "general". Like the term "special lien", the term "general lien" was first used in Scots law by Bell.¹ A general lien is said to be "general" because rather than merely securing an amount due under one contract, it instead secures a general balance owed to the lien-holder by his client or customer.² The point which must be made is that to say that a general lien secures a general balance is not to say that it covers all sums due by the one party to the other. A right of retention based on *dominium* is good generally for all sums.³ A general lien *only* covers sums arising out of services performed by the lien-holder in the same capacity in which he holds the property subject to a lien.⁴ Thus a solicitor's lien

secures his bill for the work he has carried out for his client as a law agent.⁵ It does not cover cash advances made to the client : solicitors are not moneylenders.⁶ Similarly the factor's lien will not cover debts arising out of transactions which are not factorial.⁷

The rule is seen to operate clearly in the situation where an individual carries out services in two capacities. In *McCall & Co v Black & Co*⁸ an agent acted both as a factor and a broker for a company. It was held that he could not assert a factor's lien over goods which he held in the capacity of broker. Similarly, in *Largue v Urquhart*⁹ a law agent also acted as a factor. It was held that his law agent's lien did not cover expenses incurred during an action which he had undertaken in the capacity of factor and not law agent.

1. See above, paras 158-159.

2. Bell, *Commentaries*, II,87; Bell, *Principles*, s 1411; Gloag and Irvine, pp 340-341. In *Laurie v Denny's Tr* (1853) 15 D 404, at 408, Lord Fullerton describes a general lien as a right "to retain goods for a general balance, though deposited at first for a special purpose."

3. See above, para 199; *Gloag and Irvine*, pp 330-337; *Melrose v Hastie* (1850) 12 D 655; *Hamilton v Western Bank* (1856) 19 D 152; *Nelson v Gordon* (1874) 1 R 1093. But cf *Moor v Atwal* 1995 SCLR 1119.

4. *Gloag and Irvine*, p 358; W M Gloag, *Encyclopaedia*, vol 9, para 486; A J Sim, *SME* vol 20, para 80. In *Garden Haig Scott & Wallace v Stevenson's Tr* 1962 SLT 78, at 85, Lord Carmont said : "A solicitor's lien or right of retention is quite a different right from what [the solicitor in that case] had in virtue of his holding an *ex facie* absolute title". It is of note that Professor Walker in his *Civil Remedies*, (1974), states at p 69 that a general lien will cover "all debts" before going on to show that this is not the case in the next two pages of his work.

5. Bell, *Commentaries*, II,107; *Gloag and Irvine*, pp 384-389; *Menzies v Murdoch* (1841) 4 D 257; *Paul v Meikle* (1868) 7 M 235; *Liquidator of Grand Empire Theatres v Snodgrass* 1932 SC (HL) 73.

6. *Christie v Ruxton* (1862) 24 D 1182; *Wylie's Exrx v McJanet* (1901) 4 F 195.

7. *Brown v Smith* (1893) 1 SLT 158. Given authority such as this, it is perhaps misleading to classify a general lien as an unrestricted security as Professor Gretton does in "The Concept of Security" in D J Cusine (ed), *A Scots Conveyancing Miscellany* (1987), p 126 at p 144.

8. (1824) 2 Sh App 188. See also the English case of *Houghton v Mathews* (1803) 3 B & P 485; 127 ER 263.

9. (1883) 10 R 1229.

238. Policy of the law as regards general liens. As has been stated, a general lien is an exceptional right which will only arise in limited circumstances.¹ It is surprising to note the number of writers who make this point, without explaining the policy reasons behind it.² This is particularly the case when Bell set out the matter clearly, contrasting special and general liens :

"While the special or particular lien is admitted, as the natural result of the mutual contract on which possession proceeds, and as circumscribed by that contract, so as to produce little danger of false credit; there is an obvious objection to the indiscriminate admission of general liens, either for the whole balance that happens at that time to stand in account between the parties, or for the balance due on a particular train of employment of which there is no obvious limit. This objection is somewhat analogous to that which has operated so strongly on the doctrine of hypothecs."³

Bell was all too aware of what had happened in England at the turn of the nineteenth century. There the views of Lord Hardwicke and Lord Mansfield who were much in favour of recognising general liens in as many situations as possible, were cast aside by dicta outlining the prejudicial effect of such liens upon other creditors in the event of the debtor's insolvency.⁴ These dicta remain authoritative today.⁵

Not only do general liens have the potential to create unfairness for creditors. They may also prejudice singular successors. For example, if A sends goods to B via his carrier, it is rather unfair upon B if the carrier is allowed to retain the goods until all the debts owed by A to him in respect of carriage over the last five years are met.⁶ Given the ability of general liens to adversely affect third parties by securing "hidden" debt, Scots law like English law will admit general liens only in closely defined circumstances. In particular, whilst it is in theory possible to create such liens expressly, certain criteria must be met before a court will enforce such rights.⁷

1. See above, para 236.

2. *Gloag and Irvine*, p 353; *Shaw*, p 58; *Gloag, Contract*, p 634; D M Walker, *Civil Remedies*, (1974), p 69; A J Sim, *SME*, vol 20, para 75. Note also the argument of the appellant in *Strong v Philips* (1878) 5 R 770, at 771 that "The law was very jealous of general liens".

3. Bell, *Commentaries*, II,101.

4. Bell, *Commentaries*, II, 101-102. See above, para 141.

5. *Halsbury*, vol 28, para 516; *A P Bell*, pp 142-143; I Davies, *Textbook on Commercial Law*, (1992), p 321.

6. Consequently such a lien would not be enforced : *Scottish Central Railway Co v Ferguson* (1864) 2 M 781; *Peebles & Son v Caledonian Railway Co* (1875) 2 R 346.

7. See below, para 243.

239. Basis of general liens. It has been seen that special liens have developed out of the *exceptio doli* and *exceptio non adimpleti contractus* of Roman law.¹ It is very straightforward to discover examples of special lien in other civilian and mixed systems.² In contrast, it is a considerably harder task to find cases of general lien in these jurisdictions.³ The reason for this is that general liens have English rather than civilian roots. Various pieces of evidence seem to point to this conclusion.

In the first place, the term "general lien" was not recognised in Scotland before Bell's study of the subject.⁴ In the second place, this study is heavily anglicised.⁵ In the third place, the general lien which has attracted by far the most litigation - the solicitor's lien - may well have been borrowed from south of the border.⁶ In the fourth place, English authority is particularly persuasive in the context of general lien, for example in proving whether such a right has been established by usage.⁷ In general, the law north and south of the border is very similar, contrasting with the position as regards special lien.⁸ As Lord Young stated in *Miller v Hutcheson & Dixon*, "the law of general lien . . . does not differ in England and Scotland to any material degree".⁹

In Scots law, like English law, a general lien must be founded upon contract. This may be regarded as stating the obvious. That, however, is because the received wisdom has been that all liens arise in contractual situations. One of the major submissions of this thesis is that special lien is a doctrine of the law of obligations as a whole, equally capable of arising in unjustified enrichment and delict as in contract.¹⁰ In contrast, contract is the sole domain of the general lien.

It would seem to be the case that a general lien can either be created by implied or express contract. As Bell stated : "The foundation of general lien is agreement,

either express or implied."¹¹

1. See above, paras 128, 145 and 204-210.

2. For example, France, Germany, Italy, Louisiana, Quebec and South Africa all recognise the hotelier's lien : see above, para 222.

3. The present writer has yet to find a definite example.

4. See above, paras 158-159.

5. *Ibid.*

6. See Lord Cuninghame in *Kemp v Youngs* (1838) 16 S 500, 503 and, above, para 147

7. See, for example, *Strong v Philips & Co* (1878) 5 R 770; *Mitchell v Heys and Sons* (1894) 21 R 600 and *Glendinning v Hope & Co* 1911 SC (HL) 73. See below, para 241.

8. See above, para 208.

9. (1881) 8 R 489, at 493.

10. See above, paras 168-171.

11. Bell, *Commentaries*, II,102.

240. General lien arising by implied contract : (a) agency liens. The original general liens in Scots law are those of the factor and the solicitor, both of which can be traced back as far as the seventeenth century.¹ Since then, auctioneers,² bankers,³ and brokers⁴ have also been accepted as entitled to general liens, on the ground that they are types of factor. These five liens are probably the best known cases of general lien.⁵ Bell sees them⁶ as liens which had "gradually been established by legal construction of particular contracts or connections."⁷ Gloag and Irvine regard them as based upon usage and Sim regards their foundation as common law or usage.⁸

It is submitted here that an alternative rationalisation is possible. All these individuals are agents. It has been held in the House of Lords this century that an agent is entitled to a general lien in respect of the property of his principal.⁹ Moreover, it is the case that all the liens referred to here, with the exception of the solicitor's lien, have their basis in the lien of the factor. Consequently, it may be

accepted that it is an implied term of a contract between principal and agent that the agent is entitled to a general lien. In the words of Lord McLaren :

"It is a general principle of our law that every agent has a lien or right of retention against his principal for the balance due to him".¹⁰

1. *Chalmers v Bassily* (1666) Mor 9137 and *Pearson v Murray* (1672) Mor 2625 (factor); *Cuthberts v Ross* (1697) 4 BS 374. See below, paras 265-271.

2. *Miller v Hutcheson & Dixon* (1881) 8 R 489. See below, para 257.

3. *Robertson's Tr v Royal Bank of Scotland* (1890) 18 R 12. See below, paras 244-249.

4. Bell, *Commentaries*, II,115 (policy broker); *Glendinning v Hope & Co* 1911 SC (HL) 73 (stockbrokers). See below, paras 250-253.

5. A J Sim, *SME*, vol 20, para 78. Note too that the American Law Institute, *Restatement of the Law of Security*, (1941), s 62, confers general liens on factors, attorneys at law and bankers.

6. Excluding the auctioneer's lien, which was not admitted until *Miller v Hutcheson & Dixon* (1881) 8 R 489.

7. Bell, *Commentaries*, II,106.

8. *Gloag and Irvine*, p 356; A J Sim, *SME*, vol 20, para 78.

9. *Glendinning v Hope & Co* 1911 SC (HL) 73, at 78 per Lord Kinnear. See below, para 257.

10. *Robertson's Tr v Royal Bank of Scotland* (1890) 18 R 12, at 19.

241. General lien arising by implied contract : (b) usage of trade. In his *Commentaries*, Bell discusses the general liens recognised in England by usage of trade.¹ This is followed by the statement :

"In Scotland there does not appear in our books any case in which a general lien by usage of trade has been claimed or established."²

In the latter part of the nineteenth century this was to change, with a number cases coming before the courts and the work of Bell being much cited. The courts insisted that a party seeking to rely on a general lien created by usage of trade had to prove that usage.³ Usage with respect to a particular locality could suffice.⁴ In one case, an

attempt to show that storekeepers have such a right failed because usage could not be proved.⁵ In another, it was held that scourers have no general lien, because the usage adduced was only local and found not to be universal in that locality.⁶ It has, however, been held that a general lien in favour of calenderers and packers has been established by usage in Scotland.⁷ In that case, the court placed heavy reliance upon the fact that such usage had been proven in England. Lord Gifford stated :

"Comparatively slight proof of the practice of trade in Scotland will be sufficient to establish a rule of trade which is recognised and in full force in England. It is very undesirable in matters of mercantile law and in precisely the same circumstances that different rules should prevail or be fixed for England and for Scotland when no reason whatever can be given for such variance."⁸

Similar sentiments were expressed by Bell.⁹ It is generally accepted now that evidence that a general lien exists in respect of a trade in England will help persuade a court that a similar lien should be recognised in Scotland.¹⁰ Nevertheless, in the only two other cases of a general lien established by usage resort was not made to English practice. The first of these concerns calico printers, it being held that Glaswegian members of that trade have a general lien.¹¹ The second concerns bleachers. It seems now accepted that these individuals in Scotland have the right to retain that which they have bleached in respect of their account for the year.¹² Once a lien has been established by usage, its continuing existence will apparently not be questioned.¹³

1. Bell, *Commentaries*, II, 103-104.

2. Bell, *Commentaries*, II, 104. The distinction, however, between general liens arising by common law and through use of trade is often not made. See, for example, *Gloag and Irvine*, p 356 and A J Sim, *SME*, vol 20, para 78.

3. *Gloag and Irvine*, pp 356-357.

4. *Smith v Aikmans* (1859) 22 D 344, per Lord Curriehill at 346-347; *Mitchell v Heys & Sons* (1894) 21 R 600. W M Gloag, *Encyclopaedia*, vol 9, para 485, is therefore wrong to say that local usage is not enough.

5. *Laurie v Denny's Tr* (1853) 15 D 404.

6. *Smith v Aikmans* (1859) 22 D 344.

7. *Strong v Philips & Co* (1878) 5 R 770.

8. *Ibid*, at 774. Cf with *Laurie*, above n 5, per Lord Cuninghame at 408.

9. Bell, *Commentaries*, II, 104.

10. *Gloag and Irvine*, p 357; W M Gloag, *Contract*, p 635; W M Gloag, *Encyclopaedia*, vol 9, para 485; A J Sim, *SME*, vol 20, para 79; *Gloag and Henderson*, para 19.22. In England it has been held that packers, calico printers and wharfingers have a general lien by usage, but dyers, fullers and millers do not : *Gloag and Irvine*, p 357.

11. *Mitchell v Heys and Sons* (1894) 21 R 600.

12. *Anderson's Tr v Fleming* (1871) 9 M 718.

13. In other words, continued usage need not be proved. This is certainly the position in English law : *Halsbury*, vol 28, para 516.

242. General lien arising by implied contract : (c) through a course of dealing.

In many commercial circumstances parties deal with each other on an ongoing basis. Accounts are settled periodically rather than after each individual transaction. Here the law may well imply a general lien whereby any goods being held by the tradesman are subject to a lien securing payment of all the sums due under the contracts in the period of accounting.¹ Bell illustrates the point by referring to a contract of manufacture :

"Where the employment of a workman is not in one solitary act of manufacture, but in a course of work, the payments being made not on the delivery of each parcel of goods, but periodically, once a year or half-yearly, it may be fairly presumed that the renunciation of the undoubted lien which the workman has on each parcel has in contemplation the continuance of the custom, and the renewal of a lien upon other goods."²

Thus it was held in an early case that where an account for bleaching was settled on an annual basis, any goods held by the bleacher at the end of the year could be withheld from the owner until the annual account was paid.³ The general lien is of benefit to both parties here in that individual goods can be handed over to the customer without instantaneous payment as the bleacher has security for the debt over the other goods over which he still has custody.⁴

The difference between a general lien established by usage and one established by a course of dealing, is that the latter need only arise out of the dealings between the tradesman and a particular customer. Nevertheless, the border line between the two has always been rather blurred and with particular respect to bleachers, as was pointed out in the previous paragraph, a general lien has been established by usage.⁵

1. Bell, *Commentaries*, II,104-105; Bell, *Principles*, s 1435.

2. Bell, *Commentaries*, II,104. See also Hume, *Lectures*, III,48-50.

3. *Hunter v Austin & Co* (1794) and *McCulloch v Pattison & Co* (1794), both unreported but described in Bell, *Commentaries*, II,104-105; *Aberdeen & Smith v Paterson* (1812) Hume 127.

4. See *US Steel Products Co v Great Western Railway Co* [1916] 1 AC 189, at p 211 per Lord Parmoor; *A P Bell*, p 142; I Davies, *Textbook on Commercial Law*, (1992), p 321.

5. See, in particular, the opinions in *Anderson's Tr v Fleming* (1871) 9 M 718, where the decisions cited in n 3 are regarded as establishing a general lien in favour of a bleacher by usage rather than through a course of dealing. See too *Gloag and Irvine*, p 357.

243. General lien created expressly It seems widely accepted that a general lien may be created expressly in terms of an agreement between the parties.¹ Bell writes that an express general lien will be "effectual" if "stipulated in clear and unambiguous terms".² Lord Young was very certain in his views upon general liens, remarking in one case :

"[Counsel] spoke as if it were a dangerous thing to hold that such liens may be constituted by contract. But it is only the common law of freedom applying to all who are *sui juris*. . . People can contract as to liens as they please".³

Thus, in *Bon Accord Removals v Hainsworth*⁴ a party entered into two contracts with a removal company for the removal and temporary storage of certain goods. The contracts provided that the company had a general lien for its charges. It was held that goods which formed the subject matter of one of the contracts could be detained until the sums due under both the contracts were met. Thus the rule that carriers and storekeepers only have a special lien was overridden by the express general lien.⁵

In one English case it was held that a general lien had been constituted in the light of public advertisement by the tradesman claiming it.⁶ Bell notes the doubts in a later decision "whether this power of creating liens by notice in handbills and newspapers be consistent with the true interests of trade."⁷ Nevertheless he includes a section in both his *Commentaries* and his *Principles* on general liens being raised by advertisement.⁸

There is of course a difficulty here. The policy of the law is to restrict general liens to exceptional cases, because of their prejudicial affect to creditors and singular successors of the debtor.⁹ This policy is subverted if everyone has *carte blanche* to create general liens when and where they like as Lord Young suggests. However, it would appear to be the case that his view is misguided. For a start, the law seems clear that in the case of hoteliers and carriers the special lien which the law confers upon these individuals may not be replaced by an express general lien.¹⁰ The reason is that these persons have certain duties which they must exercise for the public benefit. As Lord Young stated himself :

"I should greatly doubt the validity at common law of an agreement between a carrier and the sender of goods which professed to create a general lien to the prejudice of the consignee, to whom the carrier was legally bound to carry them at the usual rate of carriage."¹¹

In the *Bon Accord Removals* case (above), the Sheriff Principal expressly recognised that there were no third parties involved, before upholding the express general lien for which the contract of carriage had provided. Thus while the terminology of lien was used, all that was being recognised was retention at a mere contractual level.

At a wider level, judicial attitudes towards the recognition of express general liens have usually been lukewarm. The most important case on the subject is *Anderson's Trs v Fleming*.¹² It has often been cited by writers in a manner which suggests that it is authority for the proposition that express general liens will invariably be upheld by the courts.¹³ This reading of the case generates more unease when the same writers tell us that the lien in that case was not struck down as an unfair preference, although created shortly before the insolvency of the debtor.¹⁴ There is, however,

less to worry about than may seem at first. In the case bleachers who had been employed for some time by the debtor regularly returned each parcel of bleached goods with a receipt stating that all goods which they held were subject to a general lien in respect of the balance of accounts (including acceptances and promissory notes) between the parties. Upon the insolvency of the debtor, the lien constituted by this notice was upheld and was not an unfair preference as it had been created in the ordinary course of business.¹⁵

What was important for the judges was not so much the written notice, but the lien implied by the common law in the given situation. Lord President Inglis pointed out that the bleachers had an implied right arising by usage of trade to retain any goods in their hands for the past year's account.¹⁶ Turning to the notice he said :

"This contract, taking the words in the widest literal sense, would establish a lien for the general balance due on account, however long outstanding . . . But such a contract would not only be a most unreasonable but also a most illegal contract, and I cannot suppose that either party meant anything of the kind. On the contrary, I think that the fair and rational meaning of the contract is, that the bleachers stipulate for a lien for the balance of their account, meaning thereby, according to the ordinary usage of trade, the balance of the year's account remaining unsettled".¹⁷

The only additional right which the express provision gave was to ensure that the lien was not extinguished in respect of debts for which bills had been accepted, a matter on which the law was unclear.¹⁸ As Lord Kinloch stated, this point did not alter the fact that the lien "rest[ed] for its constitution on the act of law, not on contract merely."¹⁹ What must be taken out of the case is that the courts will not simply enforce a general lien because it appears in an express provision.²⁰ For, the courts are aware of the adverse affect of general liens upon third parties.

The point is illustrated by the subsequent case of *Morris v Whyte and Mackay*²¹ where storekeepers stored goods under the condition that they were "held subject to a lien by the storekeeper for his general balance against the same account". Sheriff Lees upheld the lien. He noted its "clear and unambiguous terms"²² and that it was not unreasonable. However, he warned :

"If it were sought to convert a lien for storage rents into a security for all debts due by the depositor to the storekeeper, a Court of law might not sustain such a contention as being fundamentally inconsistent with the commercial interests of the community at large".²³

1. Bell, *Commentaries*, II,104; Bell, *Principles*, s 1432; *Gloag and Irvine*, p 355-356; *SME* vol 20, para 67; *Lamb v Kaselack, Alsen & Co* (1882) 9 R 482; *Morris v Whyte & Mackay* (1893) 9 Sh Ct Rep 111.

2. Bell, *Commentaries*, II,104.

3. *Miller v Hutcheson & Dixon* (1881) 8 R 489, at 492.

4. 1993 GWD 28-1785.

5. *Stevenson v Likly* (1824) 3 S 291 (carrier); *Laurie & Co v Denny's Tr* (1853) 15 D 404 (storekeeper).

6. *Kirkman v Shawcross* (1796) 6 TR 14; 101 ER 410.

7. Bell, *Commentaries*, II,105. The doubts he refers to were expressed in *Oppenheim v Russell* (1803) 3 B and P 42. McLaren notes (p 106) that following the case of *Bowman v Malcolm* (1843) 11 M & W 833; 152 ER 1042 the doctrine of lien by advertisement may have been negatived.

8. Bell, *Commentaries*, II,105-106; *Principles*, s 1433.

9. See above, para 238.

10. See above, para 215; *Gloag and Irvine*, p 356; *Shaw*, pp 59-60; W M Gloag, *Encyclopaedia*, vol 9, para 483; A J Sim, *SME*, vol 20, para 78; *Scottish Central Railway Co v Ferguson* (1864) 2 M 781; *Peebles & Son v Caledonian Railway Co* (1875) 2 R 346.

11. *Peebles & Son*, *ibid*, at 348.

12. (1871) 9 M 718.

13. *Gloag and Irvine*, pp 355-356; *Shaw*, pp 58-59; Gloag, *Encyclopaedia*, vol 9, para 483; A J Sim, *SME*, vol 20, para 78.

14. *Ibid* and *Sim*, at para 67.

15. The unsuccessful argument was that the lien was unenforceable, being created within sixty days of the debtor's bankruptcy in terms of the now repealed Bankruptcy Act 1696, c 5. Unfair preferences are now dealt with under the Bankruptcy (Scotland) Act 1985 (c 66), s 36.

16. (1871) 9 M 718, at 720-721.

17. *Ibid*, at 721. See also Lord Deas at 722, Lord Ardmillan at 723 and Lord Kinloch at 724-725. The point is made in a footnote by *Gloag and Irvine*, p 356 and *Sim*, para 78.

18. See the discussion by Lord Kinloch at 725 and also *Harper's Creditors v Faulds* (1791) Bell's Octavo Cases 440.

19. At 725.

20. This is despite Gloag's apparent assertion that this would be the case : *Encyclopaedia*, vol 9, para 483. Thus Professor Gretton's fears on this, expressed in "The Concept of Security", in D J Cusine (ed), *A Scots Conveyancing Miscellany*, (1987), p 126, at p 144 are perhaps not entirely justified.

21 (1893) 9 Sh Ct Rep 111.

22. *Ibid*, at 114, following Bell, *Commentaries*, II,103.

23. *Ibid*, at 113.

14. BANKER'S LIEN

244. Introduction. A banker has a general lien over all the securities of his customer in his hands, which secures the general balance due to him by the customer.¹ The right is an important weapon in the armoury of the banker against defaulting customers. It sits along side his right to set off separate accounts kept by the customer, which allows him to combine an account in credit with one which is overdrawn.² These twin rights, which also exist in English law, have sometimes been subject to conflation.³ Thus the right of set off may be analysed as a right to retain the balance on one account to meet the balance on another.⁴ However, such an analysis points to a right of retention based on ownership of the sum in question, the money having been transferred to the bank.⁵ More fundamentally, the banker's right here may seem to be one of compensation, rather than retention.⁶ Further, it may be noted that the banker's lien still operates where customer and banker have expressly agreed that accounts be kept separate.⁷

1. Bell, *Commentaries*, II,113; Bell, *Principles*, s 1451; Hume, *Lectures*, III,56; *Gloag and Irvine*, p 370; J Graham Stewart, *Diligence*, (1898), p 174; *Shaw*, p 61; W Wallace and A McNeil, *Banking Law*, (10th ed, 1991, ed D B Caskie), p 21; D J Cusine, *SME*, vol 2, para 1201; A J Sim, *SME*, vol 20, para 81; L D Crerar, *The Law of Banking in Scotland*, (1997), p 107.

2. *Gloag and Irvine*, pp 370-371 and 381-383; *Shaw*, pp 66-67; *Wallace and McNeil*, pp 24-26.

3. *Gloag and Irvine*, p 381; *Halesowen Presswork and Assemblies Ltd v Westminster Bank Ltd* [1970] 3 All ER 473, at 477 per Lord Denning MR. On the distinction in England, see E P Ellinger and E Lomnicka, *Modern Banking Law*, (2nd ed, 1994), pp 501-502.

4. *Gloag and Irvine, ibid.*

5. As Buckley LJ pointed out in the *Halesowen* case, above, [1970] 3 All ER 473 at 487-488, no man can have a lien over his own property. This was approved in the House of Lords by Viscount Dilhorne and Lord Cross, at [1972] 1 All ER 641, 646 and 653. See Paget, *Law of Banking*, (11th ed, 1996), p 525.

6. *Shaw*, p 68.

7. *Paget*, pp 529-530.

245. Basis of the lien. The banker's lien appears to have been first recognised in Scotland by Bell in the second edition of his *Commentaries*. The previous edition was silent on the matter. Bell introduces the subject as follows :

"Bankers are in the nature of money-factors; and, by law, they have a general lien upon all the proper securities in their hands, belonging to any particular person, their customer, for his general balance; unless there be evidence to show that they received any particular security, under special circumstances, which would take it out of the common rule."¹

No Scottish authority is cited. Bell works simply on the basis that bankers are a type of factor and because factors are entitled to a general lien in Scots law so must bankers. He does, however, make reference to the English case of *Davis v Bowsher*,² decided in 1794. This case is accepted to be the first in English law to recognise the banker's lien.³ It involved a Bristol banker. Lord Kenyon, however, made very clear that he was not setting out law merely applicable to that city :

"I am clearly of opinion, that, by the general law of the land, a banker has a general lien upon all the securities in his hands, belonging to any particular person, for his general balance, unless there be evidence to shew that he received any particular security, under special circumstances, which would take it out of the common law rule."⁴

This passage is uncannily alike Bell's description of the banker's lien set out above. As it appears *verbatim* in an extensive footnote in Bell's work, it is even more difficult to miss the similarity.⁵ Bell perhaps noticed this himself as he substantially alters his wording in later editions.⁶ This, however, does not stop Gloag and Irvine's

statement "that the lien of a banker, in the law of England, is founded on entirely different principles from the similar lien . . . recognised by the law of Scotland" from ringing distinctly hollow.⁷ To be fair to them, the courts north and south of the border had, subsequent to Bell, taken divergent views on the basis of the lien. In England, Lord Campbell saw it as "part of the law merchant".⁸ In Scotland, Lord McLaren regarded it as arising because bankers are agents;⁹ a point going back to Bell's definition of bankers as money-factors.

The truth of the matter is that the Scottish banker's lien was born in England. Many of the cases which appear in the standard treatments of it are English.¹⁰ The lien was unknown in Scotland until Bell realised he could import it via the second edition of his *Commentaries*, because of the banker's agency. That said, the involvement of agency does mean that the lien is by no means out of place amongst the general liens recognised at Scots common law and is without question accepted today as a key general lien.¹¹

1. Bell, *Commentaries*, (2nd ed, 1810), p 488.

2. (1794) Term Rep 488; 101 ER 275.

3. *Paget*, p 522.

4. (1794) Term Rep 488 at 491; 101 ER 275 at 276.

5. Bell, *Commentaries*, (2nd ed, 1810), p 489.

6. Bell, *Commentaries*, II, 113.

7. *Gloag and Irvine*, p 371.

8. *Brandao v Barnett* (1846) 12 Cl & Fin 787 at 805; 8 ER 1622, at 1629.

9. *Robertson's Tr v Royal Bank of Scotland* (1890) 18 R 12, at 20.

10. For example, *Brandao v Barnett*, above, n 9.

11. *Gloag and Irvine*, pp 370-381; *Shaw*, pp 61-70; A J Sim, *SME*, vol 20, paras 81-84.

246. Debts secured. The lien secures the general balance owed by the customer. It covers all charges paid and disbursements made, as well as all advances made by the banker in his banking capacity.¹ Where the customer is bankrupt or *vergens ad*

inopiam the banker is additionally entitled to retain in security the money due on any bills which he has discounted although the term of payment is in the future.² This is of course correctly classifiable as a right of retention rather than a lien. The same may be said of the banker's right where the customer is *vergens ad inopiam* to retain a balance in favour of the customer and refuse to honour his cheque, in security of a bill which is yet to mature.³

1. Bell, *Commentaries*, II,113; Bell, *Principles*, s 1451; Hume, *Lectures*, III,56; *Gloag and Irvine*, pp 372-373; *Shaw*, pp 61 and 66; *Wallace and McNeil*, p 21; *Robertson's Tr v Royal Bank of Scotland* (1890) 23 R 12, at 16 per Lord President Inglis.

2. Bell, *Commentaries*, II,115; Bell, *Principles*, s 1451; *Gloag and Irvine*, pp 372-373; *British Linen Co v Ferrier* (1807), reported in Bell, *Commentaries*, *ibid*.

3. *Paul & Thain v Royal Bank of Scotland* (1869) 7 M 361; *Ireland v North of Scotland Bank* (1880) 8 R 215; *King v British Linen Co* (1899) 1 F 920.

247. Property covered. The lien attaches to all negotiable securities belonging to the customer which are deposited with the banker in the ordinary course of business.¹ Consequently, it does not cover valuable items, for example, plate, deposited for safekeeping.² The negotiable securities to which the lien does attach include bills of exchange, promissory notes, cheques and bearer bonds.³ In England, unlike Scotland, the lien has been held to attach to pieces of paper which are not negotiable, such as share certificates, policies of insurance and share certificates.⁴

The lien does not attach to bills of exchange which the banker has discounted.⁵ When a banker discounts a bill he buys it from his customer and the bill becomes his property. Being his own property, he cannot have a lien over it.⁶ Professor Gretton takes matters further by arguing that all holders of negotiable instruments are the owners thereof and thus cannot have a lien upon them.⁷ This approach seems to lack support in the relevant authorities.⁸

The fact that negotiable instruments are negotiable means that the banker may have a valid lien over them even where his customer had no right to deposit them, for example if they were stolen.⁹ In such circumstances the validity of the lien depends on the banker being in good faith and giving value.¹⁰ Thus where a stockbroker had pledged securities belonging to his clients to bankers who admitted that they did not

believe that the securities were the stockbroker's, it was held that the bankers could not assert a lien over the securities in respect of the general balance owed by the stockbroker.¹¹ Nevertheless, it was also held that the bankers were entitled to assume that the stockbroker's clients had authorised the pledge. Therefore, the securities could be retained until the specific advances for which they were pledged were repaid.

1. Bell, *Commentaries*, II,113; Bell, *Principles*, s 1451; Hume, *Lectures*, III,56; *Gloag and Irvine*, p 372; *Shaw*, pp 65-66; *Wallace and McNeil*, p 21; L D Crerar, *The Law of Banking in Scotland*, (1997), p 107.

2. *Gloag and Irvine*, *ibid*, citing Lord Campbell in *Brandao v Barnett* (1846) 12 Cl & Fin 787, at 809; 8 ER 1622, at 1631.

3. See the authorities cited in note 1.

4. *Gloag and Irvine*, p 372; *Crerar*, p 107; *Ellinger and Lomnicka*, pp 577-578; *Paget*, pp 524-525; *Re United Service Co, Johnstone's Claim* (1870) LR 6 Ch App 212; *Misa v Currie* (1876) 1 App Cas 554; *Re Bowes, Earl of Strathmore v Vane* (1886) 33 Ch D 586.

5. *Gloag and Irvine*, p 373; *Shaw*, pp 64-65.

6. *Ibid*.

7. G L Gretton, "The Concept of Security" in D J Cusine (ed), *A Scots Conveyancing Miscellany*, (1987), p 126, at p 144.

8. For example, *Robertson's Tr v Royal Bank of Scotland* (1890) 18 R 20, the court had no difficulty with a lien in respect of bearer bonds. See too *Clydesdale Bank v Liquidators of James Allan Senior and Son* 1926 SC 235, where it was held that bills endorsed and delivered to a bank for the purpose of collection remained the property of the company. And see *Shaw*, p 69, where it is said that the customer may transfer the subjects over which the lien exists.

9. *Gloag and Irvine*, p 379; *Shaw*, pp 61-62.

10. *Ibid*; *Farrer & Rooth v North British Banking Co* (1850) 12 D 1190; *London Joint Stock Bank v Simmons* [1892] AC 201. The normal rule, that the lien-holder must have custody given to him by the owner of the property or someone authorised by him does not apply here. For the normal rule, see above, paras 188-192.

11. *National Bank v Dickie's Trs* (1895) 22 R 740.

248. Exclusion of lien. In certain circumstances the banker's lien will not arise. Where securities have been accepted for safekeeping by the banker as a depositary, he has no general lien over them.¹ The same holds if the securities come into the bankers hands by mistake.² The terms of a receipt issued by a banker will be

important, although not conclusive evidence as to the capacity in which he holds the securities.³ In the case of *Robertson's Tr v Royal Bank of Scotland*,⁴ bearer bonds had been deposited with the bank which issued a receipt stating "We hold for safe keeping on your account, and subject to your order." This receipt pointed to the bank acting as a depositary. However, it was established that the bank had regularly made advances on the security of the bonds. Given this, the court took the view that the securities had been received in the ordinary course of business and that the bank consequently had a general lien over them.

The lien will also not attach to securities which have been specifically appropriated, in other words sent to the banker for a particular purpose.⁵ The onus of proof that there has been such an appropriation rests with the customer.⁶ There are certain clear cases of appropriation. For example, where a bill is handed over to meet a specific debt, the banker must follow the customer's instructions and so apply it.⁷ Similarly, where bills have been sent for discount, the banker cannot refuse to do this while at the same time purporting to exercise a lien over them.⁸

1. *Gloag and Irvine*, p 375; *Shaw*, p 62; *Wallace and McNeil*, p 22; *Crerar*, p 107; *Brandao v Barnett* (1846) 12 Cl & Fin 787; 8 ER 1622; *Leese v Martin* (1873) LR 17 Eq 224.

2. *Lucas v Dorrien* (1817) 7 Taunt 278; 129 ER 112.

3. *Gloag and Irvine*, p 376.

4. (1890) 18 R 12.

5. *Bell, Commentaries*, II, 114; *Bell, Principles*, s 1451; *Gloag and Irvine*, p 377; *Shaw*, p 63; *Wallace and McNeil*, p 22.

6. *Shaw*, p 63; D J Cusine, *SME*, vol 2, para 1201; *Robertson's Tr v Royal Bank of Scotland* (1890) 18 R 12.

7. *Allan v Allan & Co* (1831) 9 S 519.

8. *Matheson v Anderson* (1822) 1 S 486; *Haig v Buchanan* (1823) 2 S 412; *Borthwick v Bremner* (1833) 11 S 716 cf *Glen v National Bank* (1849) 12 D 353.

249. Enforcement. The banker's lien is a real right, enforceable against creditors and singular successors.¹ It is generally accepted that in Scotland, a banker has no right to sell the subjects of his lien in order to meet the debt owed to him.² Where, however, the date of payment for the bills has become due, the banker if he is the

holder of the instrument, will be entitled to obtain payment. He then will put the proceeds towards the discharge of the customer's debt.³ In the case of an unindorsed order bill he will of course be unable to do this.⁴ In England, the banker's general lien differs from most liens recognised there, in that there is an implied right of sale.⁵

1. *Robertson's Tr v Royal Bank of Scotland* (1890) 18 R 12 (sequestration); *Clydesdale Bank v Liquidator of James Allan Senior & Son Ltd* 1926 SC 235 (liquidation); *Shaw*, p 69 (singular successor).

2. *Gloag and Irvine*, p 380; *Wallace and McNeil*, p 23; *Crerar*, p 108; *Robertson's Tr v Royal Bank of Scotland* (1890) 18 R 12. *Shaw*, at p 70, however, regards it as an "open question", pointing out that in transactions between stockbrokers and bankers a right to realise may be implied.

3. *Gloag and Irvine*, pp 380-381; *Shaw*, p 70.

4. Not being the holder. See Bell, *Commentaries*, II,23.

5. *Paget*, p 523; *Ellinger and Lomnicka*, p 576; *Rosenberg v International Banking Corporation* (1923) 14 Ll LR 344, 347.

15. BROKER'S LIEN

250. Introduction. A broker is entitled at common law to a general lien over the property of his principal.¹ Brokers are essentially agents employed to transact a certain piece of business. They may therefore be contrasted with factors who are given a more general authority by their principals in order to manage their business affairs.² In some cases the distinction between factor and broker may be rather blurred,³ but as both are entitled to general liens this is not perhaps a matter of great significance in terms of present purposes.

1. Bell, *Commentaries*, II,112 and 115; Bell, *Principles*, s 1452; H Goudy, *Treatise on Bankruptcy*, (4th ed, 1914), p 548.

2. *Gloag and Irvine*, p 395.

3. Particularly in the case of stockbrokers who are considered to be factors : *Glendinning v Hope & Co* 1911 SC (HL) 73.

251. Basis of the lien. The earliest case relevant here is that of *Leslie and Thomson v Linn*, decided in 1783.¹ There, it was argued by the pursuers that an insurance broker was considered in law to be a factor and thus had the right to retain the insurance policy until paid. The defender countered, arguing that such an individual "acting in his proper sphere, is not a factor".² The Lord Ordinary found in his favour, but on appeal this decision was reversed. It is not clear whether the court on appeal accepted that the broker was a factor, or whether its decision was based on the particular facts of the case.³ It may be noted that English law had recognised a general lien in favour of a policy broker by the late eighteenth century and English authority was cited by the pursuers.⁴

Bell recognised a distinct general lien in favour of brokers merely in the context of policy brokers.⁵ For a statement of the law in relation to brokers in general, reference must be made to part of his treatment of the factor's lien :

"A broker is considered as a factor, and has a general lien on any property that is in his hands in the course of that employment, for the advances, engagements, and charges on account of his principal.

See afterwards, Of Insurance Brokers, separately."⁶

Bell therefore appears to view brokers as a sub-category of factors. This approach finds support in *Leslie and Linn*, and also in an important twentieth century case, where stockbrokers were considered to be factors and therefore held entitled to the factor's general lien.⁷ On the other hand, the law is clear that a broker receiving property in that capacity has no right to retain the property in respect of debts due to him when he acted as a factor.⁸ Given this, it is felt that it is inappropriate to view a broker as simply being a factor. A better approach is to regard both factors and brokers as agents. Both may be regarded as having general liens because of their agency.⁸

1. *Leslie and Thomson v Linn* (1783) Mor 2627.

2. *Ibid*, at 2628.

3. In particular, the insurance had been effected in the name of the broker.

4. The authority cited was *Godin v London Assurance Company* (1758) Burr 489; 97 ER 419. See also *Harding v Carter* (1781) 1 Park's Marine Insurances (8th ed) 4 and the cases noted in Bell, *Commentaries*, II,116.

5. Bell, *Commentaries*, II,115; Bell, *Principles*, s. 1452. The same approach is taken by Hume : *Lectures*, III,56.

6. Bell, *Commentaries*, II,112.

7. *Glendinning v Hope & Co* 1911 SC (HL) 73.

8. See above, para 240.

252. Stockbrokers. It is now settled law that stockbrokers have a general lien in respect of any documents belonging to their customer which they hold.¹ The point was decided in English law at an earlier stage and Gloag and Irvine correctly anticipated that the same rule would be held to apply north of the border.² As has been stated in the previous paragraph, the lien arises out of the contract of agency between stockbroker and client.

1. *Glendinning v Hope & Co* 1911 SC (HL) 73. See Gloag, *Encyclopaedia*, vol 9, para 491; A J Sim, *SME*, vol 20, para 87.

2. *Jones v Peppercorne* (1858) 28 LJ Ch 155; Gloag and Irvine, p 396. See also *In re London and Globe Finance Corporation* [1902] 2 Ch 416.

253. Insurance brokers. Most of the authority in relation to the broker's lien relates to insurance brokers and marine insurance brokers at that.¹ Goudy seems to limit the lien to cases involving marine insurance,² but as Gloag and Irvine point out there seems no ground why there should be such a limitation.³ Certainly there is nothing written by Bell to support it.⁴ Indeed, Hume writes that policies may be detained "against the ship owners or other persons assured".⁵

An insurance broker has a lien over any policy which he has effected, which enables him to retain it until the balance due to him by the insured is paid.⁶ With specific regard to marine insurance policies, the lien has been placed on a statutory footing.⁷ If the policy is paid out by the underwriter, the lien becomes transferred into a right of retention in respect of that sum.⁸ It may also be noted here that the underwriter himself has a right of retention in respect of the policy until the premium is paid.⁹ If the underwriter becomes insolvent neither the insured nor the broker may retain the

premiums nor use them in a second insurance to secure against the effect of the insolvency.¹⁰

The lien naturally depends on the broker having the policy in his hands.¹¹ If of course the broker has effected the insurance in his own name, the issue of the policy's location becomes irrelevant, as it is the broker who is entitled to be paid.¹² In the situation where the policy is effected by a sub-broker and thereafter its proceeds are paid out to him, the principal broker has a preference in respect of them as against the principal and his creditors.¹³

Where the person dealing with the broker is merely an agent the broker's lien will nonetheless secure the general balance owed by that party to him, provided the agency has not been disclosed.¹⁴ If, however, the broker is aware of the agency or ought in the circumstances to have been so aware his lien, in a question with the principal, will not secure the general balance owed by the agent. In that case it will only cover the premiums due under the particular policy.¹⁵ It has been held in England that where the broker lost possession of the policy and then later regains it, but before that becomes aware that the person dealing with him is in fact only an agent, he has then only a lien in respect of the sum due under that policy.¹⁶ Normally, the recovery of possession would restore the broker's general lien.¹⁷

1. For example, *Leslie and Thomson v Linn* (1783) Mor 2627; *Ross's Assignee v Galloway* (1806) Mor App sv "Periculum", No 1 and *Scott and Gifford v The Sea Insurance Co* Jan 22, 1825 FC.

2. H Goudy, *Treatise on Bankruptcy*, (4th ed, 1914), p 548.

3. Gloag and Irvine, p 396. As regards the position in English law, E R Hardy Ivamy, *General Principles of Insurance Law*, (5th ed, 1986), p 513, observes : "It does not appear to have been decided whether a general lien exists in other branches of insurance; presumably, such a lien may be implied from the course of business or from usage."

4. Bell, *Commentaries*, II,115-117; Bell, *Principles*, s 1452.

5. Hume, *Lectures*, III,56.

6. Bell and Hume, above; Gloag and Irvine, p 396. For an account of the relevant (and very similar) English law, see *Halsbury*, vol 25, paras 93-94.

7. Marine Insurance Act 1906 (c 41), s 53(2).

8. *Gloag and Irvine*, p 396. The broker may, however, require a special power to recover from the underwriter : see Bell, *Commentaries*, II,115 and *Goudy*, above, n 2.

9. *Scott and Gifford v The Sea Insurance Co* 22 Jan 1825, FC.

10. Bell, *Commentaries*, II,116; Bell, *Principles*, s 1452; *Selkraig v Pitcairn & Scott* (1805) Mor App sv "Insurance" No 10.

11. *Gloag and Irvine*, p 396; *Goudy*, above, n 2.

12. *Leslie and Thomson v Linn* (1783) Mor 2627.

13. *Ross's Assignee v Galloway* (1806) Mor App sv "Periculum", No 1.

14. Bell, *Commentaries*, II,116-117; Bell, *Principles*, s 1452; *Gloag and Irvine*, p 397; *Goudy*, above, n 2.

15. *Ibid*; *Losh, Wilson & Bell v Douglas & Co* (1857) 20 D 58. See also the English decision of *Fisher v Smith* (1878) 4 App Cas 1.

16. *Near East Relief v King, Chasseur & Co Ltd* [1930] 2 KB 40, at 44 per Wright J.

17. *Levy v Barnard* (1818) 8 Taunt 149; 129 ER 340.

16. FACTOR'S LIEN

254. Introduction. The factor's lien is one of the two most important general liens recognised at common law.¹ It has been recognised by the law in order that factors may willingly offer credit, knowing that the property of their principal which is in their hands will act as security.² Over the years, the courts have extended the number of individuals who are entitled to exercise this lien, thus magnifying the importance of the right in commercial terms.³ The factor's lien is also recognised in other jurisdictions, for example by English,⁴ German,⁵ and Roman-Dutch law.⁶

1. The other being the solicitor's lien. See below, paras 265-271.

2. Bell, *Commentaries*, II,109; Bell, *Principles*, s 1445; W M Gloag, *Encyclopaedia*, vol 9, para 490.

3. See below, para 257.

4. Halsbury, vol 28, para 526; *Kruger v Wilcox* (1775) Amb 252; 27 ER 168; *Drinkwater v Goodwin* (1775) 1 Cowp 251; 98 ER 1070.

5. HGB s 397; E J Cohn, *Manual of German Law*, vol 2, (1971), paras 7.116 and 7.139. This is a special rather than a general lien.

6. Voet, 16.2.20; *Wille's Law of Pledge and Mortgage in South Africa*, (3rd ed, ed T J Scott and S Scott, 1987), p 95. This is a special debtor-creditor lien.

255. Historical background. The factor's lien may be traced back to the seventeenth century, arising initially in respect of factors appointed to look after landed estates. In *Chalmers v Bassily*,¹ decided in the same year as the Great Fire of London, it was held that a factory was revocable, but with "the factor being always refunded of what he profitably expended upon consideration thereof, before he quit possession".² It was clear as early as 1735 that the lien applied to any type of property which the factor was holding.³ Erskine noted the factor's right and further, that it extended to a right to retain debts from the principal :

"Thus a factor may . . . retain his balance, not only till he recover payment of his expenses . . . but also till he be relieved of the separate engagements he hath entered into on his constituent's account, which retention will be effectual against all diligences that may be used by the constituent's creditors".⁴

Bell was the first writer to give a comprehensive account of the factor's right to retain his principal's property, also being the first to refer to it as a lien and a general lien at that.⁵ He made much use of the English law on the matter, in particular the landmark case of *Kruger v Wilcox*.⁶ Heavy reliance has been placed upon Bell's statement of the law in subsequent years.⁷ The period beginning with Bell may simply be regarded as the modern law.

1. (1666) Mor 9137.

2. *Ibid.* See also *Pearson v Murray* (1672) Mor 2625.

3. *Stephens v Creditors of York Buildings Co* (1735) Mor 9140.

4. *Erskine*, III.4.21.

5. Bell, *Commentaries*, II,109-112; Bell, *Principles*, ss 1445-1450.

6. (1775) Amb 252.

7. See, for example, *Gloag and Irvine*, pp 363-370; W M Gloag, *Encyclopaedia*, vol 9, paras, 490-494; A J Sim, *SME*, vol 20, paras 86-89.

256. **A general lien ?** It has been settled since Bell introduced the term "general lien" into Scots law that the factor's lien is such a lien.¹ Nevertheless, it is suggested that matter may not be as certain as it seems. If a person appoints a factor, he is appointing an agent with wide ranging powers. Factors perform a wide range of functions, such as buying or selling their principal's property or lending him money. The factor's lien covers all debts arising in terms of these functions : this is why it is said that the lien is general. However, it is surely arguable that all the debts arise under the same contract : the contract of factory. The lien, if this view is taken, can only be regarded as a special lien. This much seems to have been appreciated by Bell who said of the factor's lien :

"This right might almost be ranked among the special liens, from the peculiar nature of the contract of factory, as a right resulting out of the *actio contraria* of the contract by which the principal engages to indemnify the factor."²

To take this view would mean that if a party employed a factor for some months one year and then for some months two years later, property in the factor's hand in terms of the second factory could not be retained in respect of debts due in respect of the first.

At a wider level, however, it must be accepted that the factor's lien is capable of being viewed as a general one. The reason for this is that it may be possible to analyse the relationship between factor and principal as simply that : a relationship. In that way the principal can be regarded as having a set of separate contracts with the factor in respect of different tasks, but with all the debts being secured by a general lien. Parallels may be drawn with the relationship between solicitor and client.³ It must also be noted that the factor's lien since Bell wrote has been held exerciseable by individuals who are not factors in the pure sense of the word and as regards whom a contract of factory is not applicable.⁴ With respect to these individuals, the factor's lien clearly operates as a general lien.⁵ As has been shown elsewhere, the law has moved to recognising a general lien in favour of all types of agent, a factor just being one example.⁶

1. Bell, *Commentaries*, II,109; Bell, *Principles*, s 1445; Gloag and Irvine, p 363; A J Sim, *SME* vol 20, para 86.

2. Bell, *Principles*, s 1445.

3. See below, para 266.

4. See the following paragraph.

5. *Miller v Hutcheson & Dixon* (1881) 8 R 489; *Glendinning v Hope & Co* 1911 SC (HL) 73.

6. See above, para 240. See also the following paragraph.

257. The meaning of "factor". Originally, the factor's lien applied merely to land stewards or mercantile agents.¹ A mercantile agent is an individual employed as a general agent to conduct the business affairs of a merchant in a particular place.² He is entitled to buy and sell goods on behalf of his principal and will often make advances of money to him. The Factors Acts apply to the activities of such an individual.³ Towards the end of the nineteenth century, the courts began to widen the definition of "factor" so that the lien could be conferred in favour of a wider class of individuals. In *Miller v Hutcheson & Dixon*,⁴ a firm of auctioneers received horses to sell on commission and kept them in their stables until they were sold. They made advances to the owner using the animals as security. On his bankruptcy they claimed a general lien for the balance due to them, arguing that they were factors. By a majority, the Second Division held in their favour. Lord Justice-Clerk Moncreiff stated :

"I do not know what an auctioneer is if he be not a commercial agent. Goods are sent to him that he may turn them into money by public sale, and he may, if he chooses, advance money on the goods consigned to him."⁵

Lord Young, who took a very wide view as to where general liens arise, saw the lien as arising as a matter of contract.⁶ Lord Craighill, however, dissented. He pointed out that the auctioneers admitted that they were also livery stable keepers. Consequently, he reasoned that the horses were held by the auctioneers in that capacity and not as factors.⁷

Lord Craighill's dissent has some force, but with judicial opinion moving in favour of defining "factor" more widely, little notice has been taken of it. In subsequent cases, it has been readily accepted that auctioneers are entitled to exercise a factor's lien.⁸ Likewise, it is also accepted that stockbrokers may also exercise it. The matter

was settled in the important case of *Glendinning v Hope and Co.*⁹ In that case the Second Division refused to admit a general lien in favour of Edinburgh stockbrokers as they were not satisfied it had been established by usage. The House of Lords reversed this decision, noting the English authority in favour of recognising such a lien.¹⁰ However, they also upheld the appeal on the grounds of fundamental principle. Lord Kinnear stated the law of Scotland to be as follows :

"Every agent who is required to undertake liabilities or make payments for his principal, and who in the course of his employment comes into possession of property belonging to his principal over which he has power of control and disposal, is entitled, in the first place, to be indemnified for the moneys he has expended or the loss he has incurred, and, in the second place, to retain such properties as come into his hands in his character of agent until his claim for indemnity has been satisfied."¹¹

This statement has been accepted as an accurate one.¹² The law now confers a general lien on any type of agent rather than just a factor.¹³

1. *Erskine*, III.4.21; Bell, *Commentaries*, II,109-110; Bell, *Principles*, s 1445. However, Bell in his *Commentaries* at II,112 that a broker is regarded as a factor.

2. *Gloag and Irvine*, p 364.

3. Factors Act 1889 (c 45); Factors (Scotland) Act 1890 (c 40).

4. (1881) 8 R 489.

5. *Ibid*, at 491.

6. *Ibid*, at 492-493.

7. *Ibid*, at 494.

8. *Crockart's Tr v Hay & Co Ltd* 1913 SC 509; *Mackenzie v Cormack* 1950 SC 183.

9. 1911 SC (HL) 73 rev 1910 SC 209.

10. In particular, *Jones v Peppercorne* (1858) 28 LJ Ch 158 and *In re London and Globe Finance Corporation* [1902] 2 Ch 316. See Lord Atkinson at 74-75 and Lord Shaw of Dunfermline at 82-83.

11. 1911 SC (HL) 73, at 78.

12. See *Crockhart's Tr v Hay & Co Ltd* 1913 SC 509, at 520 per Lord Salveson; W M Gloag, *Encyclopaedia*, vol 9, para 491.

13. See above, para 240.

258. Sub-factors. A factor may in turn appoint a sub-factor.¹ Such an individual is entitled to retain goods entrusted to him in respect of specific advances made upon them, if he was unaware of the existence of the principal when contracting with the factor.² Bell states that a sub-factor cannot claim a lien for a general balance which will be enforceable against the principal, even where he did not know that there was a principal.³ Gloag and Irvine are sceptical about the authority of Bell's statement and cite the English position where the matter turns upon whether the sub-factor knew about the principal or not.⁴ It is submitted, however, that there is much to be said for Bell's view. It coheres with two clear principles of Scots law : firstly, that general liens are only admitted exceptionally and secondly, individuals are generally not entitled to create liens over property which is not their own.⁵

1. Bell, *Commentaries*, I,518-519; Bell, *Principles*, s 1446; *Gloag and Irvine*, p 366; Gloag, *Encyclopaedia*, vol 9, para 491.

2. *Ibid*; *Ede and Bond v Findlay, Duff & Co*, 15 May 1818, FC.

3. Bell, *Commentaries*, I,519; Bell, *Principles*, s 1446, relying upon *McCall & Co v Black & Co* (1824) 2 Sh App 188.

4. *Gloag and Irvine*, p 366. The English authority is *Mildred v Maspons* (1883) 8 App Cas 874.

5. See above, paras 188-192.

259. Debts secured. In principle the lien covers all debts arising out of the factorial relationship.¹ Thus it will secure the factor's salary;² commission;³ expenses;⁴ advances made to the principal⁵ and any guarantees authorised by the principal, or of which the principal is aware.⁶ It will not, however, cover debts assigned to the factor by other creditors of the principal.⁷ Naturally, the lien will not secure debts which arise in circumstances where the factor is acting in a non-factorial capacity. Consequently, it will not cover the price of goods supplied by the factor to the principal as an independent merchant.⁸ Likewise, where the factor also acts as a broker, debts due to him as broker are not secured by the factor's lien.⁹

1. Bell, *Commentaries*, II,112; Bell, *Principles*, s 1448; *Gloag and Irvine*, p 363; *Gloag, Encyclopaedia*, vol 9, para 490; A J Sim, *SME*, vol 20, para 86.
2. Bell, *ibid*; *Stephens v Creditors of York Buildings Co* (1735) Mor 9140.
3. *Sibbald v Gibson* (1852) 15 D 217.
4. Bell, above; *Gloag and Irvine*, above, citing the English case of *Curtis v Barclay* (1826) 5 B & C 141; 108 ER 52.
5. Bell, above; *Gloag and Irvine*, above, citing the English case of *Foxcroft v Devonshire* (1760) 2 Burr 931; 97 ER 638.
6. Bell, above; *Gloag and Irvine*, above, citing the English case of *Houghton v Mathews* (1803) 3 B & P 485; 127 ER 263.
7. *Pearson v Murray* (1672) Mor 2625.
8. *Miller & Paterson v McNair* (1852) 14 D 955.
9. *McCall & Co v Black & Co* (1824) 2 Sh App 188.

260. Property subject to the lien. The lien extends in general to all the property of the principal which is in the hands of the factor.¹ Thus it will attach to goods sent to the principal, goods bought for the principal, bills, policies of insurance, and shipping documents.² There would seem to be no reason why the factor's lien should not cover land, although the matter has not been considered in modern times.³ The lien has been said to attach also to the incorporeal property of the principal held by the factor.⁴ This is perhaps misleading. Whilst the factor may indeed retain such property, for example sums owed to the principal, his right here is a right of retention than a lien.⁵

A unique feature of the factor's lien is that it is regarded as giving him a right to the price of goods sold by him on behalf of the principal and then delivered to the purchaser, where the factor has taken the price payable to himself but where the purchaser has not yet paid.⁶ This point was first established in the case of *Stephens v Creditors of York Building Co*,⁷ decided in 1735. There the Court of Session held that :

"If a factor sells his constituent's effects and takes the price payable to himself, he will be preferable in a competition to his constituent, so long as he has anything to claim by the *actio contraria*. And for the same reason, it was

found, that he must be preferable to the constituent's creditors arresting the price in the purchaser's hand."⁸

The report does not disclose the court's reasoning. In England the same conclusion was reached by Lord Mansfield and his colleagues in the bankruptcy case of *Drinkwater v Goodwin*,⁹ decided forty years later, in 1775. Bell was quick to point out the obvious difficulty with these decisions, namely that lien is a security universally considered to rest upon possession and that possession is absent here.¹⁰ In England this problem is apparently reasoned away on the ground that the factor's right to recover the price is independent from that of the principal.¹¹

The juridical nature of the right was discussed by the court in *Miller and Paterson v McNair*.¹² For some reason, *Stephens* was not cited to the court, but *Drinkwater* was. Lord Justice-Clerk Hope, a noted civilian when it came to matters involving security, could not bring himself to recognise it as one of lien.¹³ That a factor with regard to the price as yet received was not in the same position as one with the possession of goods was a matter on which he could "entertain little doubt".¹⁴ Lord Medwyn was less troubled about what the recognition of such a right would do to established principles of Scots law. For his part, he saw the right in respect of the unpaid price as "an extension of [the factor's] lien, which partakes rather of compensation, or . . . balancing of accounts in bankruptcy".¹⁵ Lords Cockburn and Murray seemed prepared to recognise the right simply as lien.¹⁶ The case was in the event decided on another point.¹⁷ However, in *Mackenzie v Cormack*,¹⁸ decided a century later, Lord Patrick focused on the judgements other than that of Lord Hope, as well as the writings of Bell, to state that it was long "settled"¹⁹ that the right was one of lien.

With respect, the right is not a lien over the price. In the first place, as Bell noted,²⁰ the price is not in the factor's hands. That objection is *prima facie* not fatal, for the right could be rationalised as a case of Scots law embracing the doctrine of equitable lien known in England.²¹ However, such a rationalisation would be a false one. A lien is a real right enforceable against the world. Against whom is the factor's right in respect of the unpaid price enforceable? It is enforceable only against the principal and his creditors. The right against the buyer is purely personal. Were it to be otherwise the whole law of sale of goods would be subverted. A seller who has

handed over goods to a buyer is not a secured creditor for the price. Factors are not privileged over other sellers. The right in England is not categorised as one of equitable lien, as it is not enforceable upon the buyer's insolvency.²²

The right is in fact not a right in respect of the price, but a right in respect of the right to be paid the price. The principal has a personal right to be paid by the buyer. The factor has a subordinate real right over that personal right. Whether this subordinate real right can be categorised as one of lien is open to question, because a lien in respect of incorporeal property is considered generally to be impossible. Certainly, it forms part of the factor's armoury against the principal with regard to securing payment of his account. In certain circumstances, however, the factor will be regarded as having waived the right. Thus, in the *Miller* case (above),²³ the factor after selling in his own name had declared his principal and consented to a bill for the price being drawn in the principal's favour. This was held to amount to waiver, even although the principal became bankrupt before the bill was sent.

1. Bell, *Principles*, s 1447; *Gloag and Irvine*, p 363.

2. *Ibid*; *Stephens v Creditors of York Buildings Co* (1735) Mor 9140; *Miller and Paterson v McNair* (1852) 14 D 955; *Gairdner v Milne & Co* (1858) 20 D 565.

3. It may be remembered that the factor's lien first applied to land stewards : see above, para 255.

4. A J Sim, *SME*, vol 20, para 86.

5. *Erskine*, III.4.21; *Stevenson, Lauder & Gilchrist v Macbrayne & Co* (1896) 23 R 496. Scots law generally does not admit subordinate real rights in respect of incorporeal moveables. See above, paras 63 and 174.

6. Bell, *Commentaries*, II,111; Bell, *Principles*, s 1447; *Gloag and Irvine*, pp 367-368.

7. (1735) Mor 9140.

8. *Ibid*.

9. (1775) 1 Cowp 251; 98 ER 1070.

10. Bell, *Commentaries*, II,111.

11. *Ibid*.

12. (1852) 14 D 955.

13. *Ibid*, at 959-960.

14. *Ibid.*, at 960.

15. *Ibid.*, at 963.

16. *Ibid.*, at 966-967.

17. That is, that the lien had been waived. See later in this paragraph.

18. 1950 SC 183.

19. *Ibid.*, at 196.

20. Bell, *Commentaries*, II,111.

21. *Halsbury*, vol 28, paras 551-600.

22. *Ibid.*, para 526.

23. (1852) 14 D 955.

261. The need for custody. The lien depends on the factor holding the property of the principal.¹ Lord Justice-Clerk Hope considered that the factor's lien was confined to property over which the factor has actual possession.² The view echoes that of Bell.³ It has subsequently been accepted, however, that the lien will extend to property which is in the hands of an agent for the factor, even although the factor has never held the property himself.⁴ Thus civil possession through an agent appears enough to establish the lien. Symbolical possession, however, will not suffice.⁵

1. Bell, *Commentaries*, II,110; Bell, *Principles*, s 1449; *Gloag and Irvine*, p 367.

2. *Miller and Paterson v McNair* (1852) 14 D 955, at p 959. He was also prepared to recognise a lien where the actual possession had been given up, but where the lien was reserved by agreement.

3. Bell, *Commentaries*, II,110.

4. *Gairdner v Milne & Co* (1858) 20 D 565. See *Gloag and Irvine*, p 367.

5. *Gloag and Irvine*, *ibid.*

263. The lien as a real right. The lien of the factor is a real right which will be good in the case of the principal's insolvency and also against his creditors executing diligence.¹ It must be noted that where the factor has sold goods and the buyer has paid the price to the principal, the factor is then not permitted to retain the goods in security of the general balance owed to him by the principal.² The case

which decided the point reached the House of Lords, where the Lord Chancellor noted that the buyer had made payment :

"The price was therefore paid, and it was impossible to maintain that the respondents had any lien on the goods. If the cause had been tried at Guildhall, it could not have lasted a moment."³

This approach, although it amounts to a statement of English superiority, does nonetheless cohere with the general approach of Scots law in limiting the effect of general liens upon third parties.⁴ On the other hand, the general lien of the factor has been held to prevail over any right to retain of a buyer in respect of damages where the goods are disconform to contract.⁵

1. *Stephens v Creditors of York Buildings Co* (1735) Mor 9140; *Miller and Paterson v McNair* (1852) 14 D 955.

2. Bell, *Principles*, s 1447; *Gloag and Irvine*, pp 369-370.

3. *Stirling & Sons v Duncan* (1823) 1 Sh App 389, at 393. See also *Scott & Neill v Smith & Co* (1883) 11 R 316.

4. See above, paras 238 and 243.

5. *Scott & Neill v Smith & Co* (1883) 11 R 316.

263. Exclusion of the lien. The lien of the factor will be excluded in respect of any goods sent to him, if they are regarded as having been specifically appropriated.¹ Thus where goods are sent for the benefit of specific creditors the factor may not exercise a lien for his general balance in respect of them.² Clear evidence of the specific appropriation will be required.³ It has been held in England that where bills are drawn upon the factor bearing on their face a reference to a particular cargo, that this is insufficient to amount to specific appropriation of the cargo to the payee of the bills.⁴

The lien will also be excluded if the factor waives it.⁵ In this connection, it has been held that the factor is not implied to have waived his lien over certain property, simply because he has taken a bill from the principal in respect of the amount owed

to him for the purchase of the same.⁶

1. Bell, *Commentaries*, II,110-111; Bell, *Principles*, s 1447; *Gloag and Irvine*, pp 368-369; W M Gloag, *Encyclopaedia*, vol 9, para 494.

2. *Ibid*.

3. *Gloag and Irvine*, p 368.

4. *Brown, Shipley & Co v Kough* [1894] 29 Ch D 848.

5. *Gloag and Irvine*, p 369; A J Sim, *SME*, vol 20, para 89. See also *McDonald & Halkett v McGrouther* (1821) 1 S 190.

6. *Ibid*; *Gairdner v Milne & Co* (1858) 20 D 565.

264. Enforcement and extinction. The lien allows the factor to retain the property until his balance is met. Additionally, as factors have a general power to sell goods which they hold, they are able to do so in order to recover the sums which they are owed.¹ In England it has been held that a factor cannot do this if the principal objects.²

The lien, like all liens, may be extinguished in a number of ways. In particular, the lien will be lost if the property leaves the factor's hands.³ If this happens, he is not entitled to stop the goods *in transitu* in order to preserve it.⁴ However, if the factor recovers custody of the goods fairly, the lien being a general lien will be restored.⁵ More accurately, it may be said that a new general lien is created.⁶

1. Bell, *Principles*, s 1450; W M Gloag, *Encyclopaedia*, vol 9, para 487.

2. *Smart v Sanders* (1848) 5 CB 895; 136 ER 1132.

3. Bell, *Commentaries*, II,112; Bell, *Principles*, s 1449; *Gloag and Irvine*, p 367.

4. Bell, *Commentaries*, II,89; *Gloag and Irvine*, p 369; W M Gloag, *Encyclopaedia*, vol 9, para 493. Except where he is held to be the consignor : Bell, *Commentaries*, II,112.

5. Bell, *Principles*, s 1449.

6. Bell, *Commentaries*, I,112.

17. SOLICITOR'S LIEN

265. Introduction. A solicitor has a general lien over the papers of his client in respect of his account.¹ This is a long established right, the scope of which has been the subject of a very large body of case law, particularly in the eighteenth and nineteenth centuries. Indeed there have been more court decisions on the solicitor's lien - or law agent's lien as it is alternatively known - than on all the other general liens put together. This case law has provided the basis for detailed treatments of the subject by Bell,² Hume,³ Begg,⁴ and Gloag and Irvine.⁵ Given that these treatments are for the most part a satisfactory account of the law and, further, that parts of the case law deal with matters of little relevance today,⁶ the present study is not intended to be a comprehensive one. Rather, focus will be placed on what is felt are areas of particular importance.

1. Bell, *Commentaries*, II,107; Bell, *Principles*, s 1438; Hume, *Lectures*, III,50; Begg, p 204; Gloag and Irvine, p 384; J Graham Stewart, *Diligence*, (1898), p 174; Shaw, p 61; A J Sim, *SME*, vol 20, para 94.

2. Bell, *Commentaries*, II,107-109; Bell, *Principles*, ss 1438-1444.

3. Hume, *Lectures*, III,50-54.

4. Begg, pp 204-229.

5. Gloag and Irvine, pp 384-395.

6. For example, whether a lien over title deeds can be enforced against subsequent heirs of entail. On this matter, see *Murray v Elibank* (1829) 8 S 161 and Gloag and Irvine, p 391.

266. Basis of the lien. The history of the solicitor's lien has already been the subject of some attention when the general history of lien was examined.¹ It was shown there how the right was originally known as the writer's hypothec, before the terminology was changed, under the influence of Bell, to that of the law agent's lien.² It was also seen that the origins of the lien probably lie with the similar right recognised by English law.³ The first case on the matter was decided in 1697.⁴ The first writer to refer to it was Bankton.⁵

The precise basis of the lien is a matter which is subject to an interesting discussion by Gloag and Irvine.⁶ They isolate a number of authorities which, contrary to the

orthodoxy, apparently take the view that the right is a special and not a general lien. Important among these is Erskine who saw the lien as arising because the law agent has performed labour on the papers which he is entitled to retain.⁷ Two things, however, may be said about this. Firstly, the law of lien in Erskine's time was in a somewhat nascent state. Secondly, his precise wording is that there can be retention until the agent's "bill of accounts be paid". That wording would seem to suggest a general lien.

Statements from Lord Rutherford Clark and Lord Young do, however, indicate that these judges perceived the lien as special and not general.⁸ As Gloag and Irvine correctly point out, these views are misplaced.⁹ The solicitor's lien has always been understood to be an exceptional right, rather than one simply arising in terms of mutual obligations under a specific contract. In 1749, the Court of Session described it as "a creature of the Court introduced for the agent's security, who otherwise would not undertake the affairs of a person of doubted circumstances."¹⁰ In 1791, in the landmark case of *Harper's Creditors v Faulds*,¹¹ the defenders, who successfully argued that a general lien did not arise under every contract, accepted that the law agent's right was an exception. They submitted :

"But had there been a general right of retention, there could have been no occasion for introducing it in the particular case of agents."¹²

For his part, Bell stated that the lien had come into existence "partly by the force of usage and partly by judicial creation".¹³ It is thus clear that the basis of the solicitor's lien is not to be found in the general law of contract. Rather, the right has arisen in terms of the specific role the solicitor plays in society and the importance that role is recognised to have. The same may be said as regards the solicitor's lien in English law, which is accepted to have been introduced by the courts.¹⁴ The fact that the solicitor enjoys a unique and important right has been illustrated both north and south of the border by the consistent refusal of the courts to confer it upon individuals other than qualified law agents.¹⁵

1. See above, para 147.

2. See above, paras 147, 149 and 158-159.

3. See above, para 147.

4. *Cuthberts v Ross* (1697) 4 BS 374.

5. *Bankton*, I.17,15.

6. *Gloag and Irvine*, pp 385-386.

7. *Erskine*, III.4.21.

8. Lord Rutherford Clark in *Robertson v Ross* (1887) 15 R 67, at 72; Lord Young in the same case at 71.

9. *Gloag and Irvine*, p 386.

10. *Creditors of Lidderdale v Nasmyth* (1749) Mor 6248, at 6249.

11. (1791) Bell's Octavo Cases 440.

12. *Ibid.*, at 457.

13. Bell, *Commentaries*, II,107. Others place the emphasis on usage : Hume, *Lectures*, III,50 and Begg, p 204.

14. Sir William Holdsworth, *History of English Law*, vol 12, p 60.

15. *Morrison v Fulwell's Tr* (1901) 9 SLT 34; *Findlay v Waddell* 1910 SC 670; *Macrae v Leith* 1913 SC 901 (Scotland); *Hollis v Claridge* (1813) 4 Taunt 807; 128 ER 549; *Steadman v Hockley* (1846) 15 M & W 553; 153 ER 969; *Sanderson v Bell* (1834) 2 Cr & M 304; 149 ER 776; (England).

267. Development of the lien. The relative strength of the solicitor's lien as a mechanism to make the client pay his account has been diminished over the years. It was a right which was at its most powerful at the end of the eighteenth century, in the light of the important case of *Hamilton of Provenhall's Creditors*.¹ There it was held that the lien could be enforced against a creditor with a prior constituted heritable security. The report does not disclose why the judges saw fit to ignore the principle of *prior tempore potior jure*.² The argument of the successful agent was that solicitors could not be expected to search the records for prior securities before they accepted business. This hardly seems sufficient ground for disregarding general principle. Nevertheless, the decision was looked upon favourably in a couple of later decisions in one of which the court observed "that the case was well decided".³

As the years progressed, opinion became increasingly hostile towards the rule established in *Provenhall's Creditors*. Bell "lamented" it, stating that the effect was

"to extend the lien beyond its legitimate terms".⁴ He recalled Lord Justice-Clerk Macqueen saying that it "made his hair stand on end".⁵ Lord President Dunedin said that *Provenhall's Creditors* had been "followed and regretted since".⁶ Eventually, the decision was reversed by the Conveyancing (Scotland) Act 1924, s 27.⁷ The power of the lien was thereby reduced.

The potency of the lien has also been lessened by the Conveyancing and Feudal Reform (Scotland) Act 1970, s 45⁸ which provides that a sasine extract is equivalent in law to a recorded deed. The vast majority of cases concerning the solicitor's lien involve the solicitor retaining title deeds.⁹ It was common practice for agents to leave notes in red ink reminding their staff not to release deeds to clients until they paid their accounts.¹⁰ The effect of the 1970 Act is that such an exercise of the lien can be circumvented by the client - or any other party wishing the deeds - going to Register House and obtaining extracts.

With respect to the Land Register, extract land certificates may be obtained in the same way as Sasine deeds.¹¹ However, it is the actual land certificate which is required in order to apply to the Keeper for registration of an interest in land.¹² Thus the detention of the certificate by a solicitor exercising his lien *prima facie* will cause the client problems. In practice, the client is unaffected. For, the Land Registration (Scotland) Rules allow the Keeper to dispense with the obligation to produce the certificate where there is "good cause" for the failure to produce it.¹³ The Keeper has recently stated that "good cause" includes the fact that the certificate is held by a solicitor exercising his lien.¹⁴

It must be accepted that the *de facto* removal of title deeds from the scope of the solicitor's lien seriously reduces its utility. Nevertheless, there are numerous other documents which the solicitor may effectively retain, such as deposit receipts;¹⁵ wills;¹⁶ and papers kept in the clients file.¹⁷ The solicitor's lien is therefore still a useful right today, notwithstanding the statutory provisions which have somewhat negated its power.

1. (1781) Mor 6253.

2. On which, see *Gloag and Irvine*, pp 76-77; K G C Reid, *SME*, vol 18, para 684.

3. *Campbell v Smith* 1 Feb 1817, FC. Cf the opinion of the Lord Ordinary. See also *Campbell & Clason v Goldie* (1822) 2 S 16.
4. Bell, *Commentaries*, II, 108.
5. *Ibid.*, at II, 109.
6. *Macrae v Leith* 1913 SC 901, at 905. There had also been criticism in *Murray v Scott* (1829) 8 S 161; *Callender v Laidlaw* (1834) 12 S 417; *Kemp v Young* (1838) 16 S 500 and *Renny & Webster v Myles* (1847) 9 D 619. See *Begg*, p 222.
7. Conveyancing (Scotland) Act 1924, (c 27), s 27.
8. Conveyancing and Feudal Reform (Scotland) Act 1970, (c 35), s 45.
9. This fact becomes readily apparent on reading any of the standard treatments of the lien, for example, *Gloag and Irvine*, pp 384-395.
10. G L F Henry, "Solicitor's Lien", (1962) 3 The Conveyancing Review, 85.
11. Land Registration (Scotland) Act 1979 (c 33), s 6(5).
12. Land Registration (Scotland) Rules 1980 (SI 1980/1413), r 9(3).
13. *Ibid.*, r 18(1).
14. J Urquhart, "Snippets from the Conveyancing Committee", (1997) 42 JLSS 193, 194.
12. *Wight's Tr v Allan* (1840) 3 D 243.
13. *Paul v Meikle* (1868) 7 M 235.
14. *Yau v Ogilvie & Co* 1985 SLT 91; *McCormack v James Finlay Corporation Ltd*, 11 March 1986 (OH), unreported.

268. Debts secured. The lien secures in general the solicitor's entire business account.¹ There are, however, a considerable number of debts not covered. It does not extend to a yearly salary offered by the client.² In the case of an instructing agent, it will not cover the account of an Edinburgh agent because the former does not incur liability for the latter's account.³ Equally, the lien will not secure the account of an English agent, unless the instructing solicitor has paid that account or is liable to do so.⁴ In contrast, where the solicitor is employed to borrow money, the lien will extend to the account of the lender's agent, if he has paid it.⁵

The lien does not secure cash advances made to the client,⁶ nor cautionary obligations undertaken for his benefit.⁷ The same is true of duties paid for the

client,⁸ or recognisances for the expenses of the opposing party in an appeal to the House of Lords.⁹

1. Bell, *Commentaries*, II,107; Bell, *Principles*, s 1438; Hume, *Lectures*, III,50; Begg, pp 211-214; *Gloag and Irvine*, pp 388-389; *Menzies v Murdoch* (1841) 4 D 257, per Lord Fullerton at 265.

2. *Cuthberts v Ross* (1697) 4 BS 374; *York Buildings Co v Dalrymple* (1738) Elchies "Hypothee", No 9.

3. *Largue v Urquhart* (1883) 10 R 1229; Law Agents Act 1873 (36 & 37 Viet c 63), s 21. Previously, there was liability and the lien was good : *Walker v Phin* (1831) 9 S 691.

4. *Liquidator of Grand Empire Theatres v Snodgrass* 1932 SC (HL) 73.

5. *Inglis & Weir v Renny* (1825) 4 S 113.

6. *Creditors of Lidderdale v Nasmyth* (1749) Mor 6248; *Moncrieff v Colville* (1799) Bell, *Commentaries*, II,107; *Christie v Ruxton* (1862) 24 D 1182.

7. *Grant's Representatives v Robertson* (1801) Mor "Hypothee" App, No 1.

8. *Skinner v Paterson* (1823) 2 S 354.

9. *Kemp v Young* (1838) 16 S 500.

269. Custody by the agent. The lien depends on the solicitor having custody or possession of his client's papers.¹ These must have come into his hands lawfully in his capacity as agent for the client.² Thus there will be no effectual lien if the solicitor has obtained the papers under false pretences.³ The same is true where he has received them after his employment as law agent has terminated.⁴ It has been held, however, that papers handed to an agent before he is employed are subject to his lien.⁵ This may be explained on the ground that at the moment the agency commences the papers are deemed to be obtained by him as solicitor from the previous capacity in which they were held. Where the client has been sequestrated, the lien is only effectual with respect to papers received by the agent before the client became apparently insolvent.⁶

As the lien is general the papers may be retained competently for debts which became due before they were delivered to the solicitor.⁷ It is of course open to the client to exclude or vary the extent of the lien by express contract.⁸ The lien will generally be extinguished when the agent ceases to hold the papers.⁹ Where he

hands back some of them to the client, the rest remain subject to the lien for the entire account.¹⁰ It has been held that where a solicitor gives the papers to another solicitor on loan, the lien is not extinguished.¹¹ This conflicts with the general principle that lien is dependent on custody and has been criticised elsewhere.¹² The production of the client's papers in a process will not result in the lien being lost.¹³

1. Bell, *Commentaries*, II,107; Bell, *Principles*, s 1438; Begg, pp 209-210; Gloag and Irvine, p 389; *Tawse v Rigg* (1904) 6 F 544.

2. *Ibid*; *Largue v Urquhart* (1883) 10 R 1229; *National Bank of Scotland v White and Park* 1909 SC 1308.

3. *Kerr v Beck* (1849) 11 D 510, per Lord Robertson at 514.

4. *Renny & Webster v Myles* (1847) 9 D 619.

5. *Kerr v Beck* (1849) 1 D 510.

6. *Jackson v Fenwick's Tr* (1899) 6 SLT 319.

7. *Menzies v Murdoch* (1841) 4 D 257 per Lord Fullerton at 265.

8. Bell, *Commentaries*, II,109; Bell, *Principles*, s 1444.

9. Bell, *Commentaries*, II,107; Bell, *Principles*, s 1440; *Tawse v Rigg* (1904) 6 F 544.

10. *Gray v Graham* (1855) 18 D (HL) 52.

11. *Renny v Rutherford* (1840) 2 D 676; *Renny v Kemp* (1841) 3 D 1134.

12. See above, para 185.

13. Bell, *Commentaries*, II,107; *Finlay v Syme* (1773) Mor 6250; *Callman v Bell* (1793) Mor 6255.

270. The lien as a real right. Begg discusses the solicitor's right in the following terms :

"It is merely a general lien or right of retention, not amounting to a real right either of hypothec or pledge."¹

Hume had previously expressed a similar view.² While it is readily agreed that the solicitor's lien is neither a pledge nor a hypothec, it is in fact a real right effectual against singular successors and creditors.³ Being a real right, the solicitor is not

obliged to renounce it in favour of caution.⁴ That the lien is effective against singular successors was established at a very early time, the court holding that otherwise "it would in most cases be good for nothing".⁵ Thus, in a later case a solicitor was entitled to withhold a *mortis causa* deed from a person who had acquired right under it until the account due by the granter of the deed - his client - was paid.⁶

With regard to title deeds the solicitor cannot enforce his right against third parties who have an interest therein which is not derived from his client.⁷ Consequently, a vassal's law agent may not refuse production to a superior;⁸ a solicitor for a liferenter may not withhold from the fiar;⁹ and a solicitor for a heritable creditor cannot keep the deeds from the proprietor.¹⁰ The rule does not impinge on the real nature of the lien, for such individuals are not singular successors.

The solicitor's lien is effective against the client's creditors.¹¹ Thus, for example, it may be enforced against an adjudger.¹² Where, however, the solicitor has acted for both the borrower and lender in arranging a heritable security, he will be personally barred from asserting his lien against the lender, unless he informed him that he intended to exercise the right at the time the security was granted.¹³

1. *Begg*, p 205.

2. Hume, *Lectures*, III,54.

3. On lien as a real right, see, above, paras 193-197. That the solicitor's lien prevails against creditors and singular successors is pointed out by *Begg* himself at p 220. See also, Bell, *Commentaries*, II,108; Bell, *Principles*, s 1442. Hume denies that the lien is effectual against creditors and singular successors : *Lectures*, III,54. This, however, may be put down to his distaste for the decision in *Provenhall's Creditors*, (discussed above) and his wish to show that it was wrong.

4. *Ferguson & Stuart v Grant* (1856) 18 D 536.

5. *Creditors of Lidderdale v Nasmyth* (1749) Mor 6248, at 6249.

6. *Paul v Meikle* (1868) 7 M 235. See, however, the interpretation of the case of *Begg*, p 221.

7. Bell, *Principles*, s 1442; *Begg*, pp 223-224; *Gloag and Irvine*, p 391.

8. *Earl of Sutherland v Coupar* (1738) Mor 6247; *Stewart* (1742) Mor 6248.

9. Sheriff Guthrie in Bell, *Principles*, s 1442.

10. *Liquidator of Weir and Wilson Ltd v Turnbull & Findlay* 1911 SC 1006.

11. Bell, *Commentaries*, II,108; Bell, *Principles*, s 1442; Begg, p 220; Gloag and Irvine, p 390.

12. *Dalrymple v Earl of Selkirk* (1751) Elchies "Hypothee", No 17.

13. Bell, *Principles*, s 1442; *Wilson v Lumsdaine* (1837) 15 S 1211; *Allan v Sawers* (1842) 4 D 1356; *Paterson v Currie* (1846) 8 D 1005; *Gray v Graham* (1855) 18 D (HL) 52; *Drummond v Muirhead and Guthrie Smith* (1900) 2 F 585.

271. Enforcement of the lien. The solicitor has no right to sell the subject matter of his lien.¹ The right helps him to recover his debt because the client or other party wishing the documents is caused inconvenience as long as access cannot be gained to them. The fact that the agent is asserting his lien does not in itself stop his account negatively prescribing.²

In the event of the client being sequestrated, or - in the case of a company - being liquidated, the solicitor is required to deliver up the papers on the request of the trustee-in-sequestration or liquidator.³ Such delivery, however, is without prejudice to any preference of the solicitor as lien-holder, provided he can show that but for it he had a valid lien for his account.⁴ The preference which the solicitor gets is one over the whole estate, after the expenses of the sequestration or liquidation have been paid.⁵ It has never been settled, however, whether the solicitor like a floating charge holder, is postponed to any preferred creditors.⁶

It would seem somewhat unfair that a solicitor holding a few papers can on surrendering them be preferred in respect of his whole account theoretically running into thousands of pounds. The rule, however, dates back to the eighteenth century and has never seriously been questioned.⁷ It is of course the right of the court to interfere in any case where it feels that a lien is being exercised inequitably.⁸

1. *Ferguson & Stuart v Grant* (1856) 18 D 536 per Lord Curriehill at 538.

2. Bell, *Commentaries*, II,108; *Foggo's Exrs v McAdam* (1780) Mor 6252.

3. Bankruptcy (Scotland) Act 1985 (c 66), s 38(4); Insolvency (Scotland) Rules 1986, SI 1986/1915, r 4.22(4).

4. *Ibid*; *Rorie v Stevenson* 1908 SC 559; *Garden Haig-Scott and Wallace v Stevenson's Tr* 1962 SC 51.

5. *Paul v Mathie* (1826) 4 S 420; *Skinner v Henderson* (1865) 3 M 867; *Rorie v Stevenson* 1908 SC 559; *Train & McIntyre Ltd v Forbes* 1925 SLT 286; *Miln's Judicial Factor v Spence's Trs* 1927 SLT 425.

6. A J Sim, *SME*, vol 20, para 99.

7. Bell, *Commentaries*, II,108; Hume, *Lectures*, III,52; *Newland's Creditors v Mackenzie* (1793) Mor 6254; *Hotchkis v Thomson* (1794) Mor 6256; *Jamieson v McIntosh* (1810), unreported; *Watson & McNaught v Crawford's Tr* (1817), unreported; *Paul v Mathie* (1826) 4 S 424; *Skinner v Henderson* (1865) 3 M 867.

8. *Ferguson & Stuart v Grant* (1856) 18 D 536; *McIntosh v Chalmers* (1883) 11 R 8.

18. CONCLUSIONS ON LIEN

272. Comparative comments. Making comparisons between Scots law and the law of other jurisdictions is a harder task as regards lien than it was with pledge. The law varies greatly from system to system and it is not possible in this thesis to carry out a detailed comparison.¹ A good example of the variance is the matter of the extent to which lien is regarded as a real right in different countries.²

Broadly, it may be stated that our law of special lien is civilian whereas our law of general lien has a common law basis. Special lien can be traced back to the *exceptio doli* and *exceptio non adimpleti contractus* of Roman law.³ The laws of France,⁴ Germany,⁵ Quebec,⁶ South Africa⁷ and Spain⁸ upon lien all show clear evidence of Roman influence. The law of general lien is very similar to that found in England.⁹ It is clear that Bell borrowed much from south of the border on this subject.¹⁰ The division our law makes between special and general liens is one which was not recognised before Bell's writings.¹¹ Further, it is difficult to find evidence of general lien in other civilian jurisdictions.

What perhaps is the most important point is that it is possible to find evidence of lien in some shape or form in most legal systems. The core idea of the right to retain the possession of a piece of property until a debt relating to that property is discharged is in many ways as natural as the pledge idea of handing property over expressly in order to secure a debt.

1. Useful material is contained in J G Sauveplanne (ed), *Security over Corporeal Movables*, (1974) and M G Dickson, W Rosener and P M Storm (eds), *Security on Movable Property and Receivables in Europe* (1988).
2. See above, para 198.
3. See above, paras 120-128 and 204.
4. See M Planiol, *Civil Law Treatise*, vol 2, (1959), ss 2520-2524.
5. See for example, BGB, art 273. For its relation to the *exceptio non adimpleti contractus*, see G H Treitel, *Remedies for Breach of Contract*, (1988), pp 313-316.
6. See Civil Code of Quebec, art 1592 (right of retention).
7. See T J Scott, *LAWSA*, vol 15, paras 98-136.
8. See, for example, Spanish Civil Code, art 1780 (depository's lien).
9. See above, paras 236-243.
10. See above, paras 158-159 and 239.
11. *Ibid.*

273. The state of Scots law. Like pledge, lien is in a rather undeveloped state in Scots law.¹ There has been very little fundamental analysis of the subject since Bell, whose treatment of the law has come to be regarded as the unquestioned orthodoxy.² In many ways the set of rules in this area have never been fully understood and rationalised, with many being concerned that the law had been imported from England.³

At the present time lien is generally seen as a concept which is part of the law of contract and concerns only corporeal moveables. The argument of this thesis is that with regard to special lien such an understanding of the law is a very partial one. It would seem to be clear that special lien is a doctrine of the law of obligations and is a right which may be competently exercised in respect of land.⁴ Another matter which also has been subject to little analysis is the question of whether lien is a real right. The view taken here is that it is and that lien is as much part of the law of property as part of the law of obligations.⁵ A further argument of this thesis is that lien may be capable of arising out of mere custody on the part of the creditor. It has always previously been accepted that lien is dependent on possession.⁶

In conclusion, it would seem that lien is an area of our private law where there is great potential for development. It is hoped that this thesis may be of some assistance in this matter.

1. On pledge, see above, para 115. On lien, see G L Gretton, "The Concept of Security", in D J Cusine (ed), *A Scots Conveyancing Miscellany*, (1987), p 126, at pp 144-145.

2. See, for example, Lord President Emslie in *Bermans and Nathans Ltd v Weibye* 1983 SLT 299, 302.

3. See for example, Gretton, above, n 1; Lord Ivory in *Hamilton v Western Bank* (1856) 19 D 152, at 160 and Lord Justice-Clerk Hope in *Melrose v Hastie* (1851) 13 D 880 at 888.

4. See above, paras 168-171 and 175.

5. See above, paras 193-197.

6. See above, paras 177-183.

PART 4 : PLEDGE AND LIEN COMPARED

274. **Introduction.** The true nature of the distinction between pledge and lien is a matter which has been the subject of little analysis in Scots law. In England the general approach has been to say that the two rights are distinct because a pledgee has an automatic power of sale, whereas a lien-holder does not.¹ Further, English law regards a pledgee, but not a lien-holder, as having an assignable interest in the subjects of his security.² These two distinctions unfortunately do not take us very far in Scotland, for the Scots pledgee has neither an implied right to sell nor to assign.³ Moreover, to decide whether the security holder has these rights in England, one is still left with the preliminary question of whether he has a pledge rather than a lien.

It is possible to find some authorities relevant to the matter in Scotland. Bell states in his *Commentaries* that "retention operates as a pledge constituted by tacit or implied consent".⁴ Later on in the same work, he notes that "a general lien, by express agreement, is in the nature of a pledge".⁵ Lord Young, in a well known statement, opined that a lien is a "contract of pledge collateral to another contract of which it is an incident".⁶ Gloag and Irvine, for their part, write that "it is not easy, and may not in all cases be possible, to distinguish"⁷ pledge and lien. They regard an express general lien as being "practically a pledge under a different name".⁸ With respect to special lien, they say that where property is subject to such a right it is "pledged for the debt, and the possessor has the rights of a pledgee".⁹ Such an approach coheres with much of the case law on lien, where pledge terminology is never far away.¹⁰

While a considerable body of authority clearly equates lien broadly with pledge, the point may be repeated that very little analysis has ever been carried out. Gow, for example, states that a "[l]ien is a legal pledge".¹¹ He does not justify the statement. Part of the problem here is that the word "pledge" can be used in a number of different ways.¹² Now, if it is used in the sense of a general term for a security, like Bankton used it,¹³ there can be no doubt that a lien is a type of pledge. If a narrower definition is taken, that "pledge" means an express security over moveables,¹⁴ then naturally liens arising by operation of law must be regarded as implied pledges and express liens simply as pledges *per se*.

This thesis (and most modern authority) has adopted a still more restrictive definition of pledge, viewing it as the real right in security constituted over moveable property by the transfer of possession of the property by pledger to pledgee pursuant to an agreement between them that the property is to be used as security.¹⁵ If such a definition is accepted, then it is submitted that pledge may be distinguished from lien in Scots law in a number of ways which will now be considered. After this, the particular distinctions between special lien and pledge, and general lien and pledge, will be identified.

1. *A P Bell*, pp 136-137; M G Bridge, *Personal Property Law*, (2nd ed, 1996), p 147; Crossley-Vaines, *Personal Property*, (5th ed, 1973), pp 137 and 459; *Ex p Hubbard* (1886) 17 QBD 699; *The Odessa* [1916] 1 AC 145, at 159 per Lord Mersey.

2. *A P Bell*, *ibid*; Bridge, *ibid*; *Halsbury*, vol 28, para 513; *Donald v Suckling* (1866) LR 1 QB 585.

3. See above, paras 105 and 53.

4. Bell, *Commentaries*, II,87.

5. *Ibid*, II,102.

6. *Miller v Hutcheson & Dixon* (1881) 8 R 489, at 492.

7. *Gloag and Irvine*, pp 201-202.

8. *Ibid*, p 209.

9. *Ibid*.

10. For example, *Renny v Kemp* (1841) 3 D 1134 and *Christie v Ruxton* (1862) 24 D 1182.

11. J J Gow, *The Mercantile and Industrial Law of Scotland*, (1964), p 292. In Germany, real liens such as that of the carrier and the factor are treated as statutory pledges (*gesetzliche Pfandrechten*). See E J Cohn, *Manual of German Law*, vol 2, paras 7.114-7.122.

12. See above, para 7.

13. *Bankton*, I.17. See also, Adam Smith, *Lectures on Jurisprudence*, (1978, ed R L Meek, D D Raphael and P G Stein), pp 78-81.

14. See, for example, D M Walker, *Principles of Scottish Private Law*, (4th ed), pp 394-396.

15. See above, para 5.

275. Relation of the debt to the security subjects. The key difference between pledge and lien concerns the property which is the subject of the security. With lien, it is inextricably linked with the debt being secured.¹ For example, the subject of a repairer's lien is the thing which has been repaired, with the lien securing the repair bill. Likewise, the subjects of a solicitor's lien are the papers which the solicitor has worked with as a solicitor, the lien securing his account. And similarly the property which a *bona fide* possessor retains is the property which he has improved, the improvements being that for which he seeks recompense. The law is clear that a lien cannot be exercised in respect of debts which are extrinsic to the property or the capacity in which it is being held.²

With pledge, any debt or obligation *ad factum praestandum* decided upon by debtor and creditor may be secured.³ Thus the subject of the pledge need have no connection whatsoever to the secured obligation. For example, a gold bracelet can be pledged in security of debt due to a milkman. Thus the only reason why the property is in the pledgee's hands is for security. This contrasts with lien where the property is handed over for another reason, for example, for work to be performed and then the property is retained in security of the workman's bill. In the words of Sim :

"[T]he basis of a lien is usually a collateral or ancillary condition implied by law in a contract whose main preoccupation will be something other than the creation of security."⁴

1. On this point, see Jowitt, *Dictionary of English Law*, sv "Lien".

2. See above, paras 246, 259, 268 and for example, *Cuthberts v Ross* (1697) 4 BS 374; *McCall & Co v Black & Co* (1824) 2 Sh App 188 and *Largue v Urquhart* (1883) 10 R 1229.

3. See above, para 51. On this as a distinction between pledge and lien, see also R Slovenko, "Of Pledge", (1958) 33 Tul LR 59, 60.

4. A J Sim, *SME*, vol 20, para 67.

276. The exigibility of the debt. Pledge may equally secure a term loan as a loan which is payable on demand. Hence, a piece of property may be handed over in order to secure the payment of a debt which is to be discharged in ten years time.

With lien, the debt secured is due immediately. This much seems to be accepted in a number of jurisdictions.¹ With lien, the creditor is trying to speed up payment by the debtor by inconveniencing him through the detention of his property.² This contrasts with pledge where he is prepared to give the debtor a period of time to perform his obligation, because the debtor has provided security.

1. *A P Bell*, p 136; I Lawrence, *Textbook on Commercial Law*, (1992), p 319 (England); BGB, art 273 (Germany); Civil Code of Quebec, art 1592.

2. See above, para 163.

277. Pledge restricted to moveable property. It is only possible to pledge moveable property, more precisely corporeal moveables and negotiable instruments.¹ Whilst it is equally competent to have a lien over such property, it would also seem possible to exercise a lien in respect of land. There is case law and institutional authority giving a *bona fide* possessor the right to retain land until he receives recompense for improvements which he has made.² Professor McBryde sees no reason why there can be a lien over land arising under contract and the present writer agrees with him, although for different reasons.³ On the other hand, a pledge of land is clearly incompetent.⁴

1. See above, paras 60-66.

2. In particular, *Binning v Brotherstones* (1676) Mor 13401 and *Bankton*, II.9.68. See above, para 175.

3. W W McBryde, *Contract*, (1987), pp 315-316. See above, para 175.

4. Conveyancing and Feudal Reform (Scotland) Act 1970 (c 35), s 9(3). See above, para 66.

278. Pledgee has possession. Scots law following Roman law holds that in order for the creditor to have a valid real right of pledge, he must be in possession of the property in question.¹ It would seem in contrast that a lien may arise where the creditor has mere custody of the property.² Carriers, repairers and storekeepers are very good examples. They have mere custody but are entitled to liens.³ Other cases also come to mind, such as solicitors who have a general lien over title deeds and other papers in their custody. In some cases a lien will require possession on the part of the creditor : the key example is the *bona fide* possessor's lien.⁴ There is also a

very stateable argument that once an individual, say a carrier, becomes entitled to a lien, by performing his duties, he then possesses the property as he is then holding the property for his own benefit.⁵ The acceptance of this argument, however, does not alter the fact that the lien arises in a situation where the creditor has custody of the property, in contrast to pledge where he is put directly into possession of the thing.

1. See above, para 101.

2. See above, paras 177-183.

3. *Stevenson v Likly* (1824) 3 S 291; *Carntyne Motors v Curran* 1958 SLT (Sh Ct) 6; *Laurie v Denny's Tr* (1853) 15 D 404.

4. See above, para 179.

5. See above, para 180.

279. Pledge and special lien. A special lien arises by operation of law where certain criteria are satisfied.¹ These have been discussed fully elsewhere.² For the sake of convenience it may be stated that such a lien will arise where one party holds the property of another and has a duty to return it but also a counterclaim connected to it. No agreement between the parties, express or implied, is required to bring the lien into existence. In contrast, pledge must be founded upon a contract of pledge, the basis of which is consensus between the pledger and pledgee that the property in question will be pledged.³

Special lien can definitively be said not to be a "contract of pledge collateral to another contract of which it is an incident".⁴ It is a right which arises automatically in the circumstances set out above.⁵ It is no more a contract than the right of compensation or set-off.⁶

1. It is of course possible to state in a contract that an individual, for example an unpaid seller, has a special lien. However, such a provision is merely declaratory.

2. See above, paras 168 and 204-210.

3. See above, paras 83-85.

4. *Miller v Hutheson & Dixon* (1881) 8 R 489, at 492 per Lord Young. See above, para 274.

5. See too the position in Louisiana where a lien arises by operation of law depending on the nature of the debt, whereas pledge is contractual : R Slovenko, "Of Pledge", (1958) 33 Tul LR 59, 60.

6. See *Stair*, I.18.6-7, which treats compensation and retention back-to-back. Note also the discussion in *Harper's Creditors v Faulds* (1791) Bell's Octavo Cases 440.

280. Pledge and general lien. As has been seen elsewhere, general lien arises either by implied or express contract.¹ More precisely they are created by express or implied terms in contracts, rather than being contracts themselves.² The majority of general liens, for example agency liens, arise by implied contract. They may be distinguished from pledge which is only capable of being created by express contract.³ As for express lien, it must be conceded that it is the type of lien most alike pledge. This, as we saw, was the view of Bell, and Gloag and Irvine.⁴

What, however, must also be pointed out is that express general lien does differ from pledge with regard to matters such as the relation of the secured property to the debt and the exigibility of the debt, discussed previously.⁵

1. See above, paras 236-243.

2. Cf Lord Young in *Miller v Hutcheson & Dixon* (1881) 8 R 489, at 492.

3. See above, paras 83-85.

4. See above, para 274.

5. See above, paras 275-278.

281. Conclusion. It has been shown that there exist a number of differences between pledge and lien in a study which has not been exhaustive. Of course it would be foolish not to admit that there are similarities. Both are types of real security which depend essentially on the creditor holding on to the property in question. An express general lien is probably the lien most like pledge, as both arise from express contract. But just because something shares common features with another, does not mean it is the same thing as the other. A lien may appear like an implied pledge and an express lien simply as a pledge. However, as with all things we should judge not by appearance but by substance. The similarities which do exist between pledge and lien should not be used to compress the latter into the former.

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